DEPARTMENT OF JUSTICE CONFIRMATIONS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

THE NOMINATIONS OF REX E. LEE TO BE SOLICITOR GENERAL OF THE UNITED STATES; AND WILLIAM BRADFORD REYNOLDS TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

JUNE 19, 24, AND JULY 17, 1981

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CONFIRMATION HEARING ON REX E. LEE, TO BE SOLICITOR GENERAL OF THE UNITED STATES

FRIDAY, JUNE 19, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Hatch, Grassley, Kennedy, and Baucus.

Staff present: Duke Short, chief investigator; Allan Spence, investigator; and Pamela Swanner, clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

I am pleased today to have before the committee Mr. Rex E. Lee, the nominee for Solicitor General of the United States.

Mr. Lee, you have been nominated for a very important position. As Solicitor General, you will represent the U.S. Government before the Supreme Court. It would be incumbent upon you to decide what cases the Government should ask the Supreme Court to review. You must also decide what position the Government should take before the Court.

You will be called upon to supervise the preparation of the Government's Supreme Court briefs and other legal documents as well as to conduct oral arguments in the Court.

Mr. Lee, the tasks before you are great, but I am confident that if you are confirmed, you will meet them with courage and determination. I have been impressed with your background. We are glad to have you here today.

You may now proceed with your statement. I believe you have some able Senators sitting beside you, very influential and fine Senators who wish to introduce you and make some comments.

Senator Garn?

STATEMENT OF JAKE GARN, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Garn. Thank you, Mr. Chairman.

It is certainly a pleasure for me to be here today with Rex Lee. I want to prove that it is possible for a U.S. Senator to be brief. Therefore, I will not take the time to go through Mr. Lee's background and qualifications. I am certain that has been made available to members of the committee. It is extensive and distinguished.

I would like to say how very much I support Rex for this position. I have known him personally and professionally for many years, more than a decade now. I do not believe the President could have made a better selection for this position. He is indeed a legal scholar with an impressive legal background which he brings to this position.

I just wanted you and other members of the committee to know that this was not simply an approval because he happens to be from my State and it is customary for a Senator to state their position in favor of those who are nominated from their State. It goes far beyond that to a deep admiration for him personally and professionally, a feeling that this is as good an appointment as President Reagan could have made for this position.

Thank you very much.

The **Chairman**. Thank you, Senator. We are glad to have you here. I appreciate your statement on behalf of Mr. Lee.

Senator Hatch, we would be glad to hear from you.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator **Hatch**. Thank you, Mr. Chairman.

I am very happy also to be here accompanying my senior Senator and of course speaking for a fellow Utahan, a man who I have known for the better part of 25 years. I know him well.

It is my opinion that Dean Rex E. Lee comes to this nomination as an eminently qualified candidate. His academic and legal backgrounds are of the very highest caliber. Both are a testament to his willingness to persevere and to achieve.

Dean Lee graduated No. 1 in his class at the University of Chicago Law School. He went on to clerk for the U.S. Supreme Court for Justice Byron White. After service as a clerk to Justice White, he returned to his home State of Arizona where he became a partner in one of that State's most distinguished law firms, the Phoenix law firm of Jennings, Strauss & Salmon.

In 1972, he became the first dean of the J. Reuben Clark Law School at Brigham Young University. I might add that during his tenure at the law school, it has quickly achieved national recognition and distinction. Among other things, it is the first law school in our country to have two successive graduates serve as clerks on the U.S. Supreme Court from the first two graduating classes.

Dean Lee interrupted his deanship in 1975 to serve in the Ford administration as the Assistant Attorney General of the Civil Division. I want Dean Lee to know that I read in a Utah paper that he stated, when he was offered the position of Assistant Attorney General, he went through a week of agony trying to decide whether to accept a position that is largely administrative, but his decision to accept the position of Solicitor General took all of 5 seconds.

I agree with Dean Lee's opinion that the job of Solicitor General is the most challenging job in the world for a lawyer. The Solicitor is the attorney for the most powerful Nation on Earth before the world's most important tribunal.

While in private practice and while serving as the dean of Brigham Young University's Law School, Dean Lee has argued on a number of occasions before the Supreme Court, always with great distinction. As a lawyer myself, I envy Dean Lee's opportunity to supervise the preparation and presentation of those cases in which the Court is most interested that will appear before the Supreme Court each year.

I know this man personally. I know what a fair, just, decent, and impartial person he is. I know that he is honest. I know that he is courageous. I know that he is a morally qualified man. I cannot personally recommend anybody higher than I can recommend this very fine man from Utah. We in Utah are very proud that he has been given this opportunity by the Reagan administration.

The CHAIRMAN. Senator, we are delighted to have you with us. Thank you for your fine statement on behalf of Mr. Lee.

Mr. Lee, we would be glad to hear from you now. Before we do hear from you, if you have any members of your family or others you wish to introduce at this time, please have them stand.

TESTIMONY OF REX E. LEE, NOMINEE FOR SOLICITOR GENERAL OF THE UNITED STATES

Mr. LEE. Mr. Chairman, I appreciate the courtesy. I wish they were here. Unfortunately, they are in Utah.

I would like to say that I appreciate and agree fully with your comments concerning the awesomeness of this job. From my days in law school, I have felt that this was the lawyering position in the country.

The CHAIRMAN. Excuse me. We have not sworn you in and it is customary for the witnesses to be sworn.

Raise your right hand. Do you swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LEE. Yes, sir.

I would simply like to say, Mr. Chairman, that in the event that the Senate should see fit to confirm me to this position, I will devote that level of effort and dedication that will be commensurate with my assessment of its importance, which agrees in every respect with your own.

TERMINATION OF A TREATY

The CHAIRMAN. I have a few questions here that I will propound to you. Then the others will also probably have questions.

Mr. Lee, in your judgment, does the President have the power under the Constitution to declare a statute or treaty void or unenforceable because of his opinion that a statute is unconstitutional? If so, where in the Constitution is that power granted?

Mr. LEE. Certainly, Mr. Chairman, he would not have the authority to declare it unconstitutional. There are instances in which Members of Congress, the President, and other officials in the executive branch must be guided by their views as to constitutionality, but the declaration of constitutionality or unconstitutionality belongs exclusively to the courts.

The CHAIRMAN. Mr. Lee, in your opinion, does the Attorney General, or would you as Solicitor General, have any similar power? If so, please describe the statutorial or constitutional basis for that power.

Mr. LEE. The answer that I gave to the preceding question would apply just the same to that one.

The CHAIRMAN. Mr. Lee, in your view, can the United States terminate a treaty to which it is a party by any means other than terms expressed in the treaty, by a subsequent treaty, or by a subsequent statute?

Mr. LEE. Mr. Chairman, international law has not been one of my fields of significant experience or expertise, but my general understanding is that treaties can be terminated for such causes as breach and perhaps changed circumstances.

The CHAIRMAN. Mr. Lee, if under the Constitution a treaty is law and does not express or provide means for its own termination, how can it be terminated under the Constitution except by another law, that is by another statute or another treaty?

Mr. LEE. Certainly the most effective means of termination would be by another statute or another treaty. In that instance, it is true that the latter in time prevails.

I would think that the basis for termination other than by a subsequent statute or treaty would be limited, although, as I say, I have a general understanding that there is a general parallel between treaty law and contract law for matters such as breach, change of circumstances, coercion, and so forth that treaties might be declared terminated.

The CHAIRMAN. That is a distinction between international and domestic law.

Mr. LEE. That is correct. That is a distinction between international and domestic law. From the standpoint of domestic law, the subsequent statute would override. In the law of nations, that is simply a matter of the way it would be accepted in the international community, as I understand it.

The CHAIRMAN. Mr. Lee, section 5 of the United Nations Participation Act provides that the President may by Executive order implement the terms of a resolution of the United Nations Security Council. What constitutional limits do you believe will apply to that potentially extensive grant of de facto lawmaking power to the President?

Mr. LEE. Mr. Chairman, any affirmative constitutional prohibitions that are contained in the Constitution would apply to the exercise of that power in my opinion as I read the two cases of *Missouri* v. *Holland* and *Reed* v. *Covert*. The Government may have power in the international area as a matter of original authorization to act, but insofar as affirmative prohibitions are concerned, such as first amendment or equal protection or due process of law as was involved in *Reed* v. *Covert*, the entire panoply of constitutional protections are available as against a treaty just as they are against a statute.

The CHAIRMAN. Mr. Lee, as you know, there are many statutory limitations on the Federal judiciary expressed in terms of remedies denying the courts jurisdiction or removed from the courts. A well-known example is the statutory remedy of controversial limitation on jurisdiction. Others include the statutory denial of the injunctive remedy in labor disputes pursuant to the Norris-LaGuardia

Act and the provision of the Voting Rights Act, which forbids judicial review of certain determinations under the act made by the Attorney General.

What constitutional impediment do you see, if any, to a statute which proscribes the injunctive remedy of ordering the forced busing of school children on the basis of their race or color? Would you favor a statute to that effect?

Mr. LEE. This is a problem area, Mr. Chairman, in which I genuinely wish that I knew the answer. You have heard, I think, or one of the subcommittees of this committee has heard, constitutional scholars express views on both sides of that issue.

I would simply say that there is no way with confidence that anyone can give a definitive answer to that question because there is such a paucity of law on the subject.

I can tell you what the arguments are on both sides, but until that issue is actually litigated by the courts, and ultimately decided by the U.S. Supreme Court, there is no way that a definitive answer can be given.

I apologize, but that is the best answer I can give you.

The CHAIRMAN. Mr. Lee, would you please describe your opinion of the scope of the exceptions clause in the judicial article of the Constitution? I am referring to the provision found in article III, section 2 which states:

> The Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make.

Would that clause not permit, for example, a statutory exception of appellate review of cases arising out of or involving a State statute which authorized voluntary prayer in public schools?

Mr. LEE. That question of course, Mr. Chairman, is a more precise restatement of the preceding question. I can give you a bit better answer to it, although my final bottom-line answer has to be the same as it was to the preceding one.

Article III, section 2 is the strongest argument for the proposition that Congress does have the authority to cut back on the jurisdiction of the courts in certain areas. Article III divides the jurisdiction of the Federal courts into two broad areas, and far and away the more important of those two is appellate jurisdiction. It says that appellate jurisdiction is subject to such exceptions as Congress may from time to time make.

The argument on the other side is that you cannot take away the basic, core function of the courts which is to declare constitutionality.

Beyond that, I would simply have to say once again, that neither I, nor any other person in this Nation can give a definitive answer to the ultimate question unless and until it is decided by the Supreme Court.

EQUAL RIGHTS AMENDMENT

The CHAIRMAN. Mr. Lee, as you are well aware, there is some opposition to your nomination based on the belief that portions of your book, "A Lawyer Looks at the Equal Rights Amendment," indicates a lack of support for women's rights. Would you please give us your position on equal rights for women?

Mr. LEE. I am happy to, Mr. Chairman. There is nothing in that book, nothing in anything I have said, nothing in anything I have ever done, and certainly nothing in anything that I believe that is consistent with any position other than wholehearted support for achieving not only equal rights for women but also a posture in this country and a situation in this country in which women, like men, are free to pursue whatever interests they want to pursue, whether it is in the home, the law office, the Halls of Congress, or any other place, unfettered by any impediments toward the achievement of that objective either by Government, by private industry, or by individual attitudes.

On that position, I stand foursquare. It is simply that I do not feel that the achievement of that objective, all things taken into consideration, can be best brought about through the passage of the equal rights amendment. The objective, I believe, can be better brought about through the other constitutional provision that is available, plus working within the system in passing statutes, administrative regulations, and working on individual attitudes.

The CHAIRMAN. As I construe from your answer then, you unquestionably favor equal rights for women?

Mr. LEE. Without any question, Mr. Chairman.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. I want to welcome you to the committee and also congratulate you on your nomination. I enjoyed the opportunity to talk with you earlier this week. I have appreciated your response to me on some of the matters that we raised during that conversation.

We raised this question about the equal rights for women. Can you tell us what particular judicial decisions have been made in recent times that would give you the encouragement that the full goals which you have very eloquently outlined as far as equal for rights for women could be readily achieved?

Where should women in this society, who make up the majority of our population and who have listened to that very fine statement of yours from which they might take some hope, look in terms of the remedy to achieve that objective, which I think you said lies in the Constitution of the United States and also in the pursuit of various regulations and the enforcement of existing laws?

We have seen in the very recent times the backing off of this administration in terms of the enforcement of the existing laws in, for example, giving the enforcement agencies the kinds of resources to be able to pursue equal rights for women. I do not think there is any indication of that from looking at the recommendations of the administration in terms of the enforcement of these various rules and regulations. As far as I am concerned, there is a serious abdication of commitment toward those goals.

If you have some other information about how we are going to be able to do it through regulations when we have an administration that is basically moving off in the fields of regulation and backing off in terms of the enforcement mechanisms which exist to protect the rights of women, or if you have information that can give us some degree of encouragement in terms of court holdings, I would like to hear about them. Otherwise, what we are talking about is a pretty empty guarantee.

Mr. LEE. I think I understand what you are saying, Mr. Senator. I of course have no indication of coming court holdings. I am sure you are much better informed than I would be insofar as the outcome of the current legislation process.

All I am saying is this: As of 1971, about the time that the equal rights amendment first passed this Congress, there had never, insofar as I have been able to determine and as far as my research has been able to disclose, one single case in which the U.S. Supreme Court had ever afforded any relief to women because of discriminatory laws by Government, either State or Federal, not one.

The 14th amendment, with its bright guarantee of equality, had been in existence for 103 years and not once had there ever been a law held unconstitutional on the grounds that it discriminated against women. There were some very sorry examples of sex discrimination that had in fact come before the Supreme Court.

In contrast to that, between 1971 and almost a decade later, sex discrimination cases before the U.S. Supreme Court have been one of the areas of significant activity in the Supreme Court. We have seen a rather substantial body of law develop. I know that it has not developed as far as many of its supporters would like it to develop.

I recognize and respect the views of those who feel the equal rights amendment is the answer, as I hope they will respect my own. All I am saying is simply that by the time you take into account all of the weapons that are available in the arsenal to eliminate sex discrimination, including the present constitutional weapon of the 14th amendment, including the opportunity to pass additional laws to correct errors that exist through this body and others, on balance I do not favor the passage of the equal rights amendment.

Senator KENNEDY. We understand that to be your position. You are someone who has written a book expressing that viewpoint. I would still like to press you a bit about what decisions have been made by the courts that give you any indication of hope that women would be included under the protections of the 14th amendment.

Mr. LEE. I see.

Senator KENNEDY. And that the central objectives which you have just outlined for women could be achieved at least through the court process.

Mr. LEE. As I said, one is this rather substantial body of law that has developed over this intervening decade.

Senator KENNEDY. There would be some that would dispute that. Could you be somewhat more specific because you are the author of a book on this?

PROGRESS THROUGH THE COURT PROCESS

Mr. LEE. There have been about 16 decisions.

Senator KENNEDY. What areas in those court decisions would you mark down as being areas that have been particularly impressive to you where progress has been made?

Mr. LEE. Particularly impressive to me are those such as *Califano* v. *Webster* and *Califano* v. *Goldfarb* that have basically dealt in the area of what is sometimes called reverse discrimination or benign discrimination.

Bear in mind, Senator, that the only thing that either the equal protection clause or the equal rights amendment would deal with is discrimination by Government, either State or Federal. It has nothing to do with the distinctions that are drawn in the private sector.

In my opinion, one of the most important things that Government can do in this overall fight, indeed, many of the steps that Government has taken and is taking is in this area of attempting to right some of the wrongs that have been done in the past, is to recognize some of the injustices that have been visited upon women by drawing distinctions that actually favor them.

That is why I would be somewhat reluctant to bring into play what would probably be a broader prohibition against Government's ability to draw those kinds of distinctions.

A further answer to your question on other areas that have been dealt with under the 14th amendment, the first case involved an Idaho statute that favored men over women in the area of qualifying as administrators of estates. That was held unconstitutional.

The one dealing with widows' allowances has been held constitutional.

Frontiero v. *Richardson* held unconstitutional a provision that discriminated arguably against women, arguably against men with regard to certain military benefits.

Senator KENNEDY. You have mentioned some and perhaps you would want to elaborate on that to complete the record. Rather than finding these series of cases which you have identified here, action on reverse discrimination, action about qualification of who can be administrators in various State agencies, and some of these other matters, why not take just a straightforward and direct approach rather than through the courts with litigation that is perhaps interpreted in different ways in different jurisdictions, taking both the time of the courts and the resources of the individuals?

Even more basically and fundamentally, why is it not just time to say on this issue that there are founding mothers as well as founding fathers, take the direct and explicit action, and make it clear in the Constitution of the United States that discrimination against women, in whatever form it comes, is basically and fundamentally wrong and unjust and put a halt to it? Why go through this whole series of gymnastics in terms of the court process on this?

Mr. LEE. Senator, there are many who take that view and I respect that view. With due respect, the reasons I take the opposite view are these: First of all, under either circumstance, either the 14th amendment or the equal rights amendment, you are going to have court decisions. Frankly, that is one of the problems that I see with the equal rights amendment and with regard to certain decisions that ought to be policy decisions.

The best example of that that I know of are examples that relate to the draft. They are going to be shifted from the legislative domain into the judicial domain. They will be frozen into constitutional concrete and will no longer be made by those who are elected to represent the people of this Nation. They will be made by the judges.

Now maybe those decisions are right. Maybe they are wrong. My only point is they ought not to be foreclosed from the public debate by switching them over into the judicial realm as opposed to the legislative realm.

In addition, if you do limit the right of Government to draw distinctions between men and women, there are some other unfortunate consequences that may come about. Nowhere in that book do I say that they will, but they may come about, such as a very significant impediment to affirmative action or benign discrimination decisions that might be made either by State legislatures or by this Congress.

Senator KENNEDY. The fact remains that most of these situations you have talked about, at least on the question of the military, the use of toilets, other kinds of issues and questions, have been raised at least in a number of forums. I am not indicating necessarily in your book. They are basically red herrings. I think the mind is virtually unlimited in trying to suggest various propositions with which we should be concerned.

I suppose the basic question people are asking is whether the very fundamental and desirable goal of striking down the whole host of different regulations, both State and Federal where they exist, is not more compelling than those raised which I consider to be red herrings in terms of opposition to that? Does that not demand some action? You have obviously indicated your own position that you do not believe so.

Mr. LEE. That is the ultimate question of course, Senator. On that, I certainly respect your views as to what would likely be the outcome, as I would hope you would respect mine.

NEW BOOK

Senator KENNEDY. There are obviously men and women in this body who share your view, have expressed it, and have voted on that. I suppose the real question for any of us who are asked to vote on these questions is, while recognizing that there is this form of discrimination which continues to exist in our society as one of the major forms of discrimination, whether in your very important and sensitive position you have shown a sufficient sensitivity and concern about that issue as to indicate to the majority of the citizens of this country that yours is going to be an office that is going to be concerned, alarmed about these forms of discrimination, and aggressive in terms of eliminating them.

In just looking back over the background, I would say we have the book which has been written and on which questions have been raised. I understand you are the author of a new book on the Constitution. Is that correct?

Mr. LEE. Yes.

Senator KENNEDY. Is that not out now?

Mr. LEE. No, I wish it were, but it is not.

Senator KENNEDY. Can we get a copy?

Mr. LEE. I do not know. I have been told now for 6 months that it is going to be out in 6 weeks.

Senator **Kennedy**. Well, I mean you have some old notes round some place.

Mr. **Lee**. Oh, sure.

Senator **Kennedy**. Might we be able to get them?

Mr. **Lee**. Yes.

Senator **Kennedy**. If it could be made available to the committee, Mr. Chairman, we will work that out in a satisfactory way. I think that will be of help.

Do you talk about this issue in that book as well?

Mr. **Lee**. Not really. The book I have coming out is a general survey of the Constitution. In the part that deals with equal protection, there is one part that deals with sex discrimination. The treatment there would not be anywhere nearly as extensive as it is in the equal rights amendment book.

Senator **Kennedy**. I think it would be worthwhile. The question, at least in my mind, is whether in the presentation of the issue individuals should be able to feel that you are an advocate in terms of your presentation of these views and have been balanced in terms of the representation, or whether the presentation of the views has been sufficiently one sided to show an insensitivity to the issue. I think that is the end.

As you are aware, there are those who believe that you bring up the red herrings in the book on this issue, and on the other hand do not consider at least what has been the reasonable legislative interpretation of the position on the other side.

I think we will probably get into that later. I am sure you are aware that at least that point has been raised. I think it is important in these open hearings that you have an opportunity to respond to that kind of question.

Mr. **Lee**. Let me respond if I may.

With regard to what you have referred to as the red herrings, it is true that many opponents of the equal rights amendment say that these things will come about. The proponents state with equal confidence that they will not.

The position that I take in that book, Senator, is an intermediate position, and I believe it is an absolutely correct one, that there is no one who can state with confidence prior to the time that the equal rights amendment becomes the law, if it does, and is interpreted by the courts whether those will or will not come about. It is not accurate to say that I have said that these red herrings will become a reality.

Senator **Kennedy**. I do not want to dominate the time on this, but I would like to question you on this issue a bit further. Then I will yield to my colleagues.

In the Rocky Mountain Foundation, can you tell us what your position was?

Mr. **Lee**. Yes; it was called the Mountain States Legal Foundation. I was a member of the board of litigation.

Senator **Kennedy**. I should have remembered that from past debates.

Mr. **Lee**. The responsibilities of the members of the board of litigation, if that is your next question, are to make a determination concerning the cases that the foundation should and should not become involved in.

The **Chairman**. Senator Kennedy, do you have any other questions?

Senator **Kennedy**. Yes, I do have a few more. I understand Senator Hatch has a plane to catch.

The **Chairman**. Senator Hatch is leaving for Geneva. If you will yield at this time, we will call on him.

Senator **Kennedy**. I always like to see an even and equitable distribution of time.

The **Chairman**. Senator Hatch?

Senator **Hatch**. Dean Lee, how do you view your position as the Solicitor General in representing the administration?

Mr. **Lee**. The Office of the Solicitor General is the office basically of an advocate. It represents the position of the Government before the U.S. Supreme Court.

As such, the policy decisions that come out of that office are litigating policy decisions and not substantive policy decisions.

Senator **Hatch**. Who makes the substantive policy decisions?

Mr. **Lee**. Congress does. You do. The agencies do.

Senator **Hatch**. The President, too?

Mr. **Lee**. And the President. All components of Government that generate those circumstances that will result in litigation that ultimately end up in courts.

Senator **Hatch**. What if the Congress, the President, or the agencies, in advocacy with you in the litigational process, happen to differ with your personal beliefs?

Mr. **Lee**. In that event, my responsibility is very clear. That is an easy question. My job is that of an advocate. My job is not that, as yours is, of a substantive policymaker, except insofar as it relates to litigation policy.

Senator **Hatch**. There have been some issues regarding the equal rights amendment raised by various people concerning your background and your membership in the Church of Jesus Christ of Latter-day Saints, commonly called the Mormon Church, of which I am also a member. If the equal rights amendment was ratified, would you support it?

Mr. **Lee**. Of course. It would be part of the U.S. Constitution.

Senator **Hatch**. As a Solicitor General, you would do everything in your power to implement the equal rights amendment within the confines and duties of that particular office?

Mr. **Lee**. That is correct.

OBLIGATION TO CLIENT

Senator **Hatch**. What if in the process of bringing a suit or defending a suit on behalf of the Government of the United States and the people of the United States the LDS church leadership decided that they disagreed with your position? Which position would you take, that of the Government, the people, the Congress, and the President of the United States, or the position of the leadership of the LDS church?

Mr. **Lee**. I would look for my decisions to the interests of my clients, as I always have as a lawyer, and not to any organization, church, or otherwise, to which I belong.

Senator HATCH. In your law practice, did you ever give consideration to church leaders' opinions with regard to representing your clients?

Mr. LEE. Never.

Senator HATCH. I suppose it is pretty hard to divorce yourself from the background that you have had, from the training that you have had, from the teachings that you have had in your church, as you represented clients; but has that been an overriding set of circumstances as far as making your decisions whether or not to represent or how to represent various people?

Mr. LEE. That is a difficult question of course to answer, Senator. As you know, a person really cannot divorce himself from the totality of his background, his values, and all of the sources from which he draws those values.

However, I can tell you this with confidence. In making my judgment as lawyer, I consult only my professional conscience and my professional standards, the interests of my client, and the interests of the court in which I serve as an officer.

Senator HATCH. You made an intensive effort to recruit and bring women and minorities into the Brigham Young University Law School have you not?

Mr. LEE. Indeed we have.

Senator HATCH. Are there any there?

Mr. LEE. Yes.

Senator HATCH. If the administration requested you take a position contrary to the Mormon leadership, how would you balance that problem and what would you do?

Mr. LEE. That just is not a difficult problem. My obligation as a lawyer, as a professional, runs to my client. That is the relevant consideration in that respect.

A ready example on which I have been asked concerns the MX missile, to which the Mormon Church is opposed. It is very possible that during the time that I would serve as Solicitor General, in the event that the Senate should confirm me, there may be some MX issue that would come before my office. My decisions in that respect would be guided solely by my responsibilities to my client and my responsibilities to the court.

Senator HATCH. Then you would not consider your loyalty to your beliefs and your church to be the overriding concern in representing the people of the United States?

Mr. LEE. No. They relate to another matter.

Senator HATCH. It is believed, widely disseminated, and true that the Mormon Church leadership has written letters contrary to the equal rights amendment. I might add that that has been a very controversial thing.

Are all Mormons who are strong supporters of the equal rights amendment chastised, criticized, or excommunicated from the Mormon Church?

Mr. LEE. The answer is no.

Senator HATCH. Would you elaborate on that?

Mr. LEE. I have a number of friends who are strong supporters of the equal rights amendment who have neither been chastised, criticized, or excommunicated.

Senator HATCH. Has that affected you friendship for those people?

Mr. LEE. Certainly not.

Senator HATCH. Has that made you feel that they were any less than you or less than other good members of the church?

Mr. LEE. Certainly not.

Senator HATCH. I might add that some people have had the feeling that if you stand up and advocate for the equal rights amendment as a member of the Mormon Church, you would be otherwise sanctioned by the church or perhaps even excommunicated. Has that been your experience?

Mr. LEE. No.

Senator HATCH. It certainly has not been mine either. Dean Lee, as I have known you, you have always been an advocate of equality and equal rights for all people. As I understand your position on the equal rights amendment, you feel that equal rights for women can be achieved in another way?

Mr. LEE. That is correct.

Senator HATCH. As I understand your advocacy in that regard, you have honored the right of others to have a view contrary to your own and I presume that you respect others who have views contrary to your own with regard to the equal rights amendment.

Mr. LEE. Yes.

Senator HATCH. Or with regard to affirmative action?

Mr. LEE. Yes.

Senator HATCH. Or with regard to abortion?

Mr. LEE. Yes.

Senator HATCH. Or with regard to school busing?

Mr. LEE. Yes; or with regard to anything else.

Senator HATCH. I think that has been a hallmark of your career and a credit to you as a human being. I am very proud to support you for this position. I know that what you have said here is true.

I have no doubt in my mind that you will stand up for women in this country as much as all minorities and as much as anybody else in our society.

With that, Mr. Chairman, I will close my questions.

The CHAIRMAN. Thank you, Senator.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Senator KENNEDY. I do not want to cut off my friend, but I thought I yielded.

The CHAIRMAN. You yielded, but your time was up, Senator. If we can arrange it between you two, it will be all right.

Senator KENNEDY. I had asked the staff about a time limitation because I am glad to go either by time or by permitting to——

The CHAIRMAN. Senator Baucus, does that suit you to let him go ahead?

Senator BAUCUS. Fine.

The CHAIRMAN. Senator Kennedy?

Senator HATCH. Will you yield, Senator Kennedy? Thank you so much for yielding to me so that I could make this important meeting. I appreciate it.

Senator KENNEDY. Just to come back to the Mountain States Legal Foundation, can you give us some idea of how active you were on that board?

Mr. LEE. We would meet once a year, sometimes twice a year for the purpose of passing on cases. In other instances, we would have telephone calls or letters from the staff getting our views as to whether we should become involved in certain cases. I would say that in addition to the once or twice a year that we met, that might have taken an average of a half hour a week, maybe an hour a week.

Senator KENNEDY. Did they keep you informed as to how the cases were going?

Mr. LEE. They tried, Senator Kennedy. I certainly will not say that I was up to date on every case that was going on at any time.

AFFIRMATIVE ACTION

Senator KENNEDY. Have you been involved in the preparation on behalf of the Mountain States Legal Foundation of a litigating strategy concerning reverse discrimination or affirmative action?

Mr. LEE. No, I think I have not.

Senator KENNEDY. Were any such cases brought by the Mountain States Legal Foundation? I refer you to *Delio* v. *University of Colorado Law School* case. I am just trying to get some information from you.

Mr. LEE. I do not have any recollection of that case.

Senator KENNEDY. It dealt with opposing the affirmative action and quota programs as being unconstitutional even where there had been prior discriminatory practices. I understand the Mountain States Legal Foundation was involved in that.

Mr. LEE. Senator, I think I would have remembered if I had had any involvement in that case and I just do not.

Senator KENNEDY. Would you review your own notes of those meetings and find out whether there were any while you were on the board? This would be with regards to sex discrimination, with title 9, or affirmative action.

Mr. LEE. What I will have to do is just ask them if I participated in any of those during the time that I was there. I really do not remember the cases that I was involved in.

Senator KENNEDY. Whatever way or means you feel will provide that information to us, if you would pursue that and provide that to the committee, I think that would be helpful. I think it is important.

As you can understand, if we take the combination of position on equal rights, if there have been actions that have been taken by the Mountain States Legal Foundation with regard to women's issues, if there have been references in your newer book, and actions taken in the law school, I think what we are basically talking about is a position in the Justice Department that has enormous influence and importance not only in carrying forward the Constitution of the United States but in making decisions whether certain cases will be brought, will be argued, will be advanced, and will not be advanced.

If you believe that the discrimination against women is a major blight in terms of our own society, I suppose there is the question as to what kind of confidence people would have in your position as Solicitor General in striking down the forms of discrimination, whether you would be not just complying or conforming with the statutes but whether you would recognize that this is a matter of urgency and importance and be an aggressive advocate in eliminating one of the serious blights upon our system.

I think that is what I am driving at in terms of making some judgment and determination and, to the extent we can, making some kind of record on which to be able to make a judgment about the qualifications for service as a Solicitor General.

With regards to a question that was raised by the Senator from Utah, Senator Hatch, let me just ask about the university and the law school.

Could you tell us how many women students and faculty members are at the law school?

Mr. LEE. There is one faculty member.

Senator KENNEDY. When was she hired?

Mr. LEE. She came in about 1976, I think. We had been trying to get her for some time before that, but we finally got her then.

Beginning about 4 years ago, Senator, we initiated at our law school a vigorous program to recruit women as students to law school. We had the perception that there was a feeling among people who were potentially interested in our law school that there was something wrong with women going to law school.

As a consequence, there were several of us, and I was one of them, who initiated a program to encourage women that there was nothing wrong with women going into law, that there were opportunities for women in law, and that they should seriously consider it as one of the alternatives. Some of the products of that recruiting program are sitting here in this hearing room this afternoon.

I believe as a result of that program we approximately doubled the number who have been going to law school since that program started. It is not terribly impressive. It is now up to between 25 and 30 in each class as opposed to about half that before, but we believe it is progress.

Senator KENNEDY. How many in the class?

Mr. LEE. Out of about 150. That would be about 16 or 18 percent.

Senator KENNEDY. What was your role in this?

Mr. LEE. I was the dean of the law school. There were several of us who instigated the program. It originated as a result of other people on our faculty, but I wholeheartedly supported it. I think it is fair to say that no one was more vigorous in pursuit of implementation of that program than I was.

Senator KENNEDY. I have just one or two other areas. Then I know my colleagues want to question.

Other than your action on the book on the ERA, have you been involved in other public activities involving the passage or nonpassage of the amendment?

Mr. LEE. Yes; I have given some speeches. I also acted in a consulting capacity with the lawyers who were involved in this lawsuit in Idaho.

Senator KENNEDY. You will indicate various cases that you would recuse yourself from?

Mr. LEE. I have done so.

Senator KENNEDY. Do you believe that it would be constitutional for Federal funds to go to a segregated State hospital or a school system if the Government has been barred from seeking an effective end to such segregation?

Mr. LEE. Senator, I am sure you can understand my reluctance to give any bottom line answers to difficult constitutional problems. What I will say is that I think there are good constitutional issues and good constitutional arguments on both sides of that one, but it certainly is not clearcut on either side.

Senator KENNEDY. You have written about the Constitution.

Mr. LEE. That is true. Many people have written about the Constitution and could not answer that question.

Senator KENNEDY. Rather than your bottom line, what is your top line?

Mr. LEE. My top line is that there are good arguments on both sides of that issue. That is also something that in the event that you and your colleagues should confirm me might come before me. At this time, in this setting, I am simply reluctant to give you a final answer to that question.

Senator KENNEDY. What about limiting the jurisdiction of the courts and the Supreme Court?

Mr. LEE. I believe I gave the only answer I can give to that question earlier to the chairman.

Senator KENNEDY. Why do you not give it to me?

Mr. LEE. It is, once again, that there is a solid basis in article III of the Constitution dealing with the appellate jurisdiction of the Supreme Court being limited to such exceptions as Congress may from time to time make. There is a solid basis for the argument that on a case-to-case basis in some instances Congress may have certain power to cut back on the jurisdiction of the courts.

On the other hand, there is also a solid argument, based on *Marbury* v. *Madison* and on the core function of the judiciary as being the interpretation of the Constitution, that in certain instances that cannot be done.

How the collision between those two principles would be resolved on a case-by-case basis is something that I can no more answer than I can answer whether the red herrings to which we have referred under the equal rights amendment will or will not come about.

Senator KENNEDY. You may not think so, but it certainly is of importance to me to know what your views are on this. I mean, you may think whether it is these red herrings which can be dismissed and about which you cannot do anything, I think we will be the final judge of that in terms of our own individual votes.

However, just as a policy matter, where do you come out on limiting the Supreme Court's jurisdiction?

Mr. LEE. If I had my choice, which would I rather have? Which position would I rather see come about?

Senator KENNEDY. You have stated it.

Mr. LEE. If there is one thing that comes through in both the equal rights amendment book and also in the other one, it is that basic policy judgments in our society ought to be made by the legislators rather than by the courts.

However, I just have a serious question whether that is a legislative policy or not. I am just very hesitant to give any kind of a final answer to question, particularly when it involves something that may be quoted back to me at the time I examine it again in the context of a more concrete situation when I then have all of the facts before me.

Senator KENNEDY. We have had various recommendations and suggestions that we limit the jurisdiction of the Supreme Court on prayer, on busing, on abortion, and on a variety of different matters that are considered and are political hot potatoes.

For years, the Congress in many instances shifted the burdens on over to the courts. Sometimes they liked to take them. Sometimes they liked to shift them over to the courts.

My question to you is whether, as a constitutional scholar, it is wise constitutional policy to limit the jurisdiction of the Supreme Court in areas which involve basic, fundamental, and individual rights?

Mr. LEE. I see. I apologize that I did not understand your question before. I think I do now.

My view on that, Senator Kennedy, is this: Whether you have that power or not, I would hope that you would use it sparingly because it does call into play some very fundamental tensions between two branches of government. There are times when that has to be done, but, as I say, I would hope it would be used sparingly, as a matter of discretion of policymaking that lies within your domain.

Senator KENNEDY. I have some materials that I would like to make a part of the record now if I could.

The CHAIRMAN. Would you like them to be put in at this time, Senator?

Senator KENNEDY. Yes, please.

The CHAIRMAN. Without objection, they will be entered into the record.[1]

Senator KENNEDY. I want to thank the witness for his response. I would appreciate your getting that information to us at the earliest possible time. I want to thank you for your responsiveness.

Mr. LEE. Should I deliver that to Mr. Wides, Senator Kennedy?

Senator KENNEDY. You can deliver it to my office, and I imagine a copy to the Chair, but make sure I get a copy of it.

Mr. LEE. That had to do with the Mountain States Legal Foundation?

Senator KENNEDY. Yes.

The CHAIRMAN. If you will send it to the staff, the staff can get it to the distinguished Senator and make it available to others who may wish to see it, too.

Senator KENNEDY. Thank you very much, Mr. Chairman.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. Thank you very much, Mr. Chairman.

Dean Lee, I think all of us are very interested in your response to the general question about the degree to which your loyalty and membership in the church might affect your professional judgment and the exercise of your duties as Solicitor General. I think all of us—I think I can speak for members of the committee—are somewhat heartened by your response.

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[1] Not available at press time.

I am wondering though about a statement you made in response to Senator Hatch. His question was when might your loyalty to your church affect your duties? I think your response was that it would not, that your membership and loyalty to the church and faith in the church is a separate matter, completely separate and distinct from your responsibilities as Solicitor General.

Would not your loyalty to the church affect your duties in those cases where the church might be a party to any action that you might be involved in?

Mr. LEE. Senator Baucus, I appreciate that question. To the extent that it would, and if it ever would, then there is a very simple solution. That is to disqualify myself.

Senator BAUCUS. Can you name some other instances where you might have to disqualify yourself?

Mr. LEE. I have on file with the Justice Department a list of those cases and instances in which I would disqualify myself.

Senator BAUCUS. I do not have that file here.

Mr. LEE. Of course you do not. Let me give them to you briefly.

There are a couple of general ones. Those would be any case in which I participated personally. Those are identified insofar as I know them.

Also, any case in which there might be even the appearance of evil or the appearance of impropriety if I were to participate regardless of whether there were or not is included. The hypothetical that you just gave me would fall into that category if at all.

Senator BAUCUS. What about those cases where the Mountain States Legal Foundation is a party?

Mr. LEE. The way I plan to handle that is as follows: In that event, I will simply ask my staff to call to my attention those in which the Mountain States Legal Foundation is involved. I will then find out if I had any participation in those cases. If I did, I will disqualify myself.

Senator BAUCUS. What about those cases where your university might be a party?

Mr. LEE. Where the university is involved, I will as a blanket matter disqualify myself.

Senator BAUCUS. As I understand you, even though you favor the rights of women, you are opposed to the equal rights amendment because you feel that a constitutional amendment would freeze in the Constitution certain provisions which you feel should be more in the domain of the legislative branch.

Mr. LEE. That is correct.

Senator BAUCUS. Could you expand just a little more fully?

Mr. LEE. Yes. Let me give you the best example that I am aware of: the draft. It may be that the Supreme Court will force me to another example because it may be that this one has also been foreclosed even under the 14th amendment depending on how this case comes out.

However, if there is one issue on which I submit that our country has not yet reached a consensus, it is whether or not women ought to be subjected to the draft. There are people who have passionate views on that both ways. Some feel that they should. Some feel that they should not.

My point is not which side is right and which side is wrong. What I am more concerned about is that that is a matter that ought to remain within the sphere of national debate and ought not to be removed from the halls of the policymaking bodies such as this one by freezing it into constitutional concrete. That is something that ought to be decided by Congress and not by the courts.

Senator BAUCUS. At least with respect to the rights of women, I take it you feel that generally Congress should make these decisions and not the Supreme Court interpreting a constitutional amendment.

Mr. LEE. That is correct. With my view that affirmative action and reverse discrimination is probably the constitutional issue for women of the 1980's, I just think that it is not in our interest at this time to narrow rather than broaden the extent to which those kinds of decisions can be made by elected policymakers.

Senator BAUCUS. If you generally favor public policy issues being determined by Congress, do you favor a constitutional amendment to balance the budget, or should that be something left to the prerogative of the Congress?

Mr. LEE. We can look at all aspects of that one, but other things being equal, I would say the same thing about that that I do about the equal rights amendment.

Senator BAUCUS. What about the right to life amendment?

Mr. LEE. We could go down through, but let me just give you this as a general proposition. Only where you can make a clear case, an almost overwhelming case that a policy problem needs to be solved by constitutional amendment should you consider doing it by constitutional amendment.

Senator BAUCUS. Is the right to life amendment one of those cases in your view?

Mr. LEE. Let me say that I have not really decided on that one yet.

Senator BAUCUS. Excuse me?

Mr. LEE. Let me say that the standard that I follow would be the standard that I just indicated to you: only if an overwhelming case could be made. However, I just do not know yet. I have not yet made up my mind as to whether that particular case fits that description or not.

Senator BAUCUS. Is it your belief that the pursuit of the protection of women's rights is or is not a close call? Is that an issue that should be addressed by Congress and not by constitutional amendment?

Mr. LEE. It is the latter. It is a matter that should be addressed by Congress.

Senator BAUCUS. However, is that a close call for you or is that an easy question for you?

Mr. LEE. Is your question whether the issue of the equal rights amendment is a close call or not?

Senator BAUCUS. That is right.

Mr. LEE. No, it really is not a close call.

Senator Baucus. If that is the case, would you not have to recuse yourself in those cases involving the equal rights amendment even where the church or the university is not a party?

Mr. Lee. Let me put it this way: The only case that I can perceive that would come before me as Solicitor General in the event confirmed involving the equal rights amendment is the one that is now pending in Idaho. I have already identified that as one in which I would disqualify myself.

In the event the amendment were passed, you heard my answers earlier to Senator Hatch. I would be hesitant at this time to make any kind of a blanket commitment for all circumstances as to what I would or would not do.

Senator Baucus. You said earlier that your job is to be the advocate of the United States before the U.S. Supreme Court.

Mr. Lee. That is correct.

Senator Baucus. Does that mean that in no instance would you advise the Court that a statute is unconstitutional, or that in no instance would you refuse to defend a statute on the grounds that it is unconstitutional?

Mr. Lee. Of course you and I have had this conversation once before on the official record. Let me restate it for you because that is a most relevant question to the performance of the responsibilities of Solicitor General. That is a very relevant question.

For that purpose, I divide the cases into two categories. One category involves the distinction between those cases in which what you really have is one branch of government being pitted against another. In those instances, the Department of Justice and the Solicitor General simply have to take sides. They cannot represent both sides of the government. Let us leave those cases aside because I think those are not the ones you are talking about.

Senator Baucus. That is correct.

Mr. Lee. In other cases, the standard I would apply once again is an overwhelming one, except here it is overwhelming plus. Only in the rarest of instances is it the responsibility of the Department of Justice or the Solicitor General in the discharge of his particular responsibilities to make the judgment that a statute is so clearly unconstitutional that he cannot defend its constitutionality.

I have to reserve, however, the possibility of that one instance that might come up once in a decade, such as *United States* v. *Lovett.* I think the decision that the Solicitor General made in that case was a correct decision.

Aside from that extreme kind of instance, I think that the Solicitor General and the entire Department of Justice owe a heavy obligation of deference to the Congress and the rest of the Government whom they serve to defend the constitutionality of statutes that are passed.

Senator Baucus. In your view, should the Department be required to report to Congress in the event that the Department or Solicitor is going to take that one instance in a decade where it will not defend a statute on the grounds that it is unconstitutional?

Mr. Lee. As an offhand matter, without thinking it through, that kind of procedure seems to make good sense to me.

Senator Baucus. I think it makes good sense, too. It would be very helpful at least to this committee if you as Solicitor or the

Department ever decides to take that view, if you inform us as well as the House Judiciary Committee with sufficient advance notice so that you can be advised of our views on the statute. I think it would be very helpful.

Mr. LEE. I thank you for that view, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman. I have no further questions.

The CHAIRMAN. Does anyone else have any questions?

[No response.]

The CHAIRMAN. Mr. Lee, thank you very much.

I believe we have some other witnesses to hear. We have a panel here: Ms. Teddie Wood, Mormons for the Equal Rights Amendment; Ms. Judy Lichtman, Women's Legal Defense Fund; Ms. Iris Mitgang, National Women's Political Caucus; and Ms. Eleanor Smeal, National Organization for Women.

Ladies, please come up and be sworn. Hold up your right hand, please.

Shall the evidence you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. WOOD. Yes.

Ms. LICHTMAN. Yes.

Ms. MITGANG. Yes.

Ms. SMEAL. Yes.

The CHAIRMAN. Thank you.

The committee rules call for all witnesses to file with the committee at least 48 hours in advance of a hearing a written statement of their testimony. I have been advised that none of our witnesses today submitted their testimony as required.

However, I intend to receive your testimony. I am sure that many of your organizations will be testifying before this committee at some future date. I would ask that in the future, in order that your testimony be given the careful consideration that it deserves, that you comply with the rules of the committee.

Is that agreeable with you, ladies?

Ms. LICHTMAN. Yes, thank you.

The CHAIRMAN. You may proceed. Do you have a spokesman for all four of you, or are you taking different views?

Ms. MITGANG. We each have a statement.

Ms. LICHTMAN. We each have a statement. While our statements may vary slightly in form, I think, indeed, we all agree with one another.

The CHAIRMAN. We will give you 5 minutes each for summarizing. Your entire statement will be put in the record.

How long is your statement, Ms. Wood?

Ms. WOOD. I have four pages, double-spaced.

The CHAIRMAN. Would you want to summarize it and put your entire statement in the record?

Ms. WOOD. If you do not mind, Senator, I would like to read through it. I will read quickly.

The CHAIRMAN. If you want to read it, go ahead. If any of you care to summarize it, it will save time. Your entire statement is going to be in the record and available to all the members.

You may proceed, Ms. Wood.

TESTIMONY OF TEDDIE WOOD, MORMONS FOR THE EQUAL RIGHTS AMENDMENT

Ms. WOOD. Thank you.

I am Teddie Wood of Virginia, a fifth generation Mormon raised in Idaho and Utah. I am a parent. I hold a master's degree in public administration from the University of California at Riverside. I work for the U.S. Navy. I am a cofounder of National Mormons for ERA. I am a member of the National Organization for Women.

I appreciate the opportunity to speak today. Within the Mormon community, there has not been debate back and forth on all sides about equal citizenship for women. Therefore, any opportunity is very much appreciated to discuss these issues.

The CHAIRMAN. To begin with, this is not a hearing or forum to discuss the merits or demerits of the equal rights amendment. The hearing here today is concerning Mr. Rex Lee to be Solicitor General. Please confine your remarks today to that subject.

Ms. WOOD. Very good.

The purpose for which I am here today is to talk about the context of the proposed Lee nomination. There has been discussion about the traditionally sexist community and values he comes from. As a Mormon woman, I think what I have to say is relevant to understanding some of the concerns of the women in the audience.

The Mormon Church has "the woman problem" these days. Numbers of women are leaving the church, more than ever before. Many American women in general are disenchanted. Some feel threatened by Reagan administration proposals and increasingly President Reagan also has "the woman problem".

Rex Lee represents the Mormon Church and the Reagan administration, and both have difficulty accepting women's expansion into full political and economic participation in American society. Many of us women are doubtful, therefore, that he can do a fair job as U.S. Solicitor General. His vision of women and for women is narrow at best.

I, for one, strongly oppose him for the lip service he gives the idea of women's equal civil rights while undercutting the equal rights amendment. This is a negative theme we hear from many quarters.

I see Mr. Lee in part as an extension of my church's crusade against women's rights, the same crusade that resulted in the Mormon Church's excommunication of Sonia Johnson, the Chair of Mormons for ERA. Her book comes out in November. That book, "From Housewife to Heretic," and the book by Marilyn Warenski called "Patriarchs and Politics, the Plight of the Mormon Woman," can help us all understand in part why people with Mr. Lee's attitudes and beliefs concerning the rights of women are sure to result in "the woman problem."

We could naively hope that his views change for the better, for the positive, but that is not likely until he is directed to change those views by the president of the Mormon Church who set politically faithful Mormons against equal constitutional rights for women in the first place.

I urge you to probe this man's views further. I ask you to ask him whether, if directed by the church president, he would obediently change his position. He is obliged to. At least that is the Mormonism that I have grown up with. I have heard some things this afternoon from Mr. Lee and Senator Hatch which indicate that maybe we Mormons could champion the ERA and get away with it if we were successful attorneys or prominent men. We then might handle our differences with the political policies of the church more easily. Maybe that would have averted excommunication in the case of Sonia Johnson and others.

I am suggesting that most Mormons who oppose the equal rights amendment do so out of loyalty to the Mormon president-prophet rather than conscientious objection to the amendment itself. That is how Mormonism usually works. That is one reason I am particularly wary of the present tendency to draw on religious loyalty for political purposes. I value the separation of church and state as an American ideal. Often we Mormons do not, however, make that distinction between the two kinds of authority.

My purpose is to urge the committee to seek to understand the kind of motivation and attitudes characteristic of a Mormon stake president. I believe Mr. Lee is at this time holding that office, which is equivalent to a bishop over a diocese.

Consider some events that have significance. Mormonism was established in New York State in 1830 and transplanted in the Rocky Mountains in the 1840's. Mormonism was forced in 1890 by the U.S. Government to postpone its 40-year misadventure with polygamy. Some ghosts of polygamy and those attitudes still haunt many of us in our views about women.

However, our leaders still cling to the notion that patriarchy is a sacred commandment, when in fact it is one of humankind's destructive traditions beyond which Mormons and many others must rapidly and positively move if Mormonism is to halt the present talent drain and alienation among fair-minded progressive women and men.

Although fortunately the traditional Mormon priesthood barrier to certain black men was finally dropped in 1978, all Mormon women, no matter what their skin color is, are still officially the underclass in Mormonism. Statistics available in Utah on high suicide, depression, and divorce rates, plus low wages for women are worth looking into in this regard. We Mormons cannot deny that our families, and our women in particular, have problems which even our best church programs cannot remedy. Denial that problems exist will not solve them.

Our wealthy Mormon patriarchy launched the church's first national political campaign—since battling antipolygamists for Utah statehood in the late 1800's—against the equal rights amendment in 1974. Before the debate began, discussion was closed tight on this issue. Although a divine revelation has never been announced, many Mormons infer that a revelation has been received from God on this issue and they feel bound as a matter of church loyalty.

In 1977, we pro-ERA Mormons, with considerable pain did the only thing we found we could conscientiously do. We began a countercampaign for the equal rights amendment. It was literally run out of our kitchens. It was a matter of conscience, and we know some of the risks and pressures to come our way as a consequence of speaking out. That is not to say that I am not proud of the positive aspects of Mormonism, but I believe it is a fact that we live with deeply entrenched sexism and many of us are learning to recognize it, understand it, and struggle with it.

Senator Hatch and Sonia Johnson collided during a Senate subcommittee hearing and Sonia's pro-ERA Mormon views attracted publicity.

The Mormon church exposed its basically sexist nature late in 1979 by excommunicating Sonia, a woman we had chosen to speak for us because she was especially likable, exemplary as a Mormon, housewifely—if any of us can easily define what that is anymore—moderate, and yet outspoken.

The American public widely condemned the excommunication as a dreadful injustice. The church severely damaged its wholesome public image, and the Mormon feminist network continues to grow.

Mormonism will never quite be the same, and neither will we as individuals because a discussion of sorts now goes on regarding women's issues within the Mormon community. Other Mormons have been excommunicated in more quiet circumstances. This is documentable. There is strain, but the discussion about women's choices has finally begun. The equal rights amendment has made this contribution to Mormonism.

This is part of the political backdrop against which we must consider a good Mormon soldier such as Rex Lee. He is undoubtedly a nice person in many respects, but he is bad news for many American women and their families.

Surely even the Reagan administration can begin to deal more positively with its woman problem and appoint someone who truly is for women's equal civil rights and will go all the way in that regard.

There are, by the way, many Mormons who are with us on this issue. Some of them, happily, are men. One brother about 67, an attorney, approached me and several other pro-ERA Mormon women after a Sunday school class last year. We were talking about what banner the airplane should fly over Salt Lake City's worldwide Mormon conference—we send them feminist messages that way. This gentleman affectionately said that it really worried him when he saw us all together talking like that. Then he leaned closer and very firmly said: "You know, we need the equal rights amendment, because it is right." There is a man to give Mr. Lee lessons. That touched me. We need the men to work with us.

The brother then chuckled because after he had just told an 8-year-old girl out in the hall how wonderful little girls were, she looked up at him and quipped, "Yeah, and we are going to take over the world, too." We feminists need that little girl's phone number.

I appreciate the opportunity to speak with you and would be glad to answer questions, after I read a few quotations, voicing some Mormon feminists' feelings about this proposed appointment.

Having heard about the appointment, Belle Cluff, a film maker and writer from Arlington, Va. said: "Pray to Mother in Heaven."

Merrilee Latta, businesswoman from Salt Lake City, and past president of the Equal Rights Coalition of Utah said:

He, Lee, has little knowledge of women's problems. He has not tried to understand the plight of women. His book distorts legal briefs and fear is his message. The Solicitor General should represent all women and not just groups he is close to. I think women feel truly threatened. I see no one coming to the defense of women and families who need help.

From Lonetta Murphy of Provo, Utah, Mr. Lee's hometown:

Mormon Women for ERA in Provo, Utah, are adamantly opposed to Dean Rex Lee's appointment as Solicitor General. Lee is against the ERA and has shown no tangible evidence whatsoever of advocating equal rights for women in Utah or any place else.

The last one is from Maida Rust Withers, George Washington University professor and artist from Arlington, Va. "Couching anti-ERA dogma in legalese, as Mr. Lee has done in his book, will not deceive women, nor your committee."

Thank you.

[The material follows:]

A MORMON FOR E.R.A. LOOKS AT REX LEE

I am Teddie Wood of Virginia, a fifth generation Mormon raised in Idaho and Utah. I am a parent. I hold a master's degree in public administration from the University of California, Riverside and I work for the U.S. Navy. I am a co-founder of National Mormons for E.R.A. and I am a member of the National Organization for Women.

The Mormon Church has "the woman problem" these days. Numbers of women are leaving the Church, more than ever before. And many American women are very disenchanted and some feel threatened by Reagan administration proposals.

President Reagan also has "the woman problem." Rex Lee represents both the Mormon Church and the Reagan administration and many of us women are doubtful that he can do a fair job as U.S. solicitor general. I for one strongly oppose him for the lip service he gives the idea of women's equal civil rights while undercutting the Equal Rights Amendment.

I see Mr. Lee in part as an extension of my Church's feverish crusade against women's rights, the same crusade that resulted in the excommunication of Sonia Johnson. Her book comes out in November, entitled "From Housewife to Heretic." That book along with Marilyn Warenski's "Patriarchs and Politics, the Plight of the Mormon Woman" help us understand in part why people with Mr. Lee's attitudes and beliefs are sure to have "the woman problem." We could naively hope his views change for the better, for the positive, but that's not likely until he is directed to change those views by the President of the Mormon Church. I urge you to probe this man's views; I suggest you ask him whether, if directed by the Church President, he would obediently change his position. He is obliged to. I am suggesting that most Mormons who oppose the Equal Rights Amendment do so out of loyalty to the President/Prophet rather than to a conscientious objection to the amendment itself. That is how Mormonism works. That is one reason I am particularly wary of the present tendency to draw on religious loyalty for political purposes. I value the separation of church and state as an American ideal. Often we Mormons do not, however, make the distinction between the two kinds of authority.

My purpose is to urge the Committee to seek to understand the kind of motivation and attitudes that a Mormon stake president (similar to the bishop over a diocese) is likely to have. Mr. Lee is a stake president. Consider some events that have significance.

Established in New York State in 1830 and transplanted in the Rocky Mountains in the 1840's, Mormonism was forced in 1890 by the U.S. Government to postpone its 40 year misadventure with polygamy, but our leaders still cling to the notion that patriarchy (official, Church-sponsored sexism) is a sacred commandment, when in fact it is a destructive tradition beyond which we Mormons (and many others) must rapidly and positively move if Mormonism is to halt the present talent-drain and alienation among progressive women and men. Although fortunately the Mormon priesthood barrier to certain black men was finally dropped in 1978, all Mormon women, no matter what their skin color is, are still officially the underclass in Mormonism. Some statistics available in Utah on high suicide, depression, and divorce rates plus low wages for women are worth looking into in this regard.

Our wealthy Mormon patriarchy launched the Church's first national political campaign (since battling antipolygamists for Utah statehood in the late 1800's) against the Equal Rights Amendment in 1974. In 1977 we Mormons For E.R.A. began a counter-campaign literally run out of our kitchens and VW's as a matter of conscience and knowing some of the risks and pressures to come our way. Senator Hatch and Sonia Johnson collided during a Senate subcommittee hearing and Sonia's pro-ERA Mormon views attracted considerable publicity. Late in 1979 the Church blatantly exposed its basically sexist nature by excommunicating Sonia Johnson whom we had chosen as chair because she was especially likable, exemplary, housewifely (of such a thing exists), moderate, and yet outspoken. The American public widely condemned the excommunication as a dreadful injustice, the Church severely damaged its wholesome public image, and the Mormon feminist network continues to grow and operate. Mormonism will never quite be the same and neither will we because now a discussion of sorts now goes on regarding women's issues. This is part of the political backdrop against which we must consider a good Mormon soldier such as Rex Lee. He is undoubtedly a nice person in many respects but he is bad news for many American women and their families. Surely even the Reagan administration can begin to deal more positively with its woman problem and appoint someone who truly is for women's equal civil rights.

There are, by the way, many Mormons who are with us on this issue and some of them, happily, are men. A brother about sixty-seven, an attorney, approached me and several other pro-ERA Mormon women after a Sunday School class last year. He leaned over into our circle (we were talking about what feminist banner to have the plane pull over Mormon Conference in Salt Lake City since we like to have a presence at each semi-annual world conference the brethren hold) and he affectionately said that it worried him when he saw us all together talking like that. But then he leaned closer in and firmly said, "You know, we need the Equal Rights Amendment, because it's right." Now there's a man to give Mr. Lee lessons. That touched me. We need the men to work with us. The brother then chuckled that after he'd just told an eight year old girl out in the hall how wonderful little girls were, she'd looked up at him and quipped, "Yeah, and we're gonna take over the world, too." I need that little girl's phone number.

The CHAIRMAN. The Utah Association of Women have issued a statement concerning Mr. Lee. I assume this would be an appropriate place to place it in the record.

It reads:

The Utah Association of Women is a group representing over 1,500 Utah women from all walks of life. We have joined together to study current issues of local and national interest.

During our studies of the pros and cons of the proposed Equal Rights Amendment, Dean Rex Lee has been an invaluable source of experience and expertise. His knowledge of the history of discrimination against women, his understanding of its presence in our society today, and his views on how to eliminate it have been a deciding factor in the formation of our association's resolution on the Equal Rights Amendment.

We feel, as does Dean Lee, that the ERA is not an appropriate method for resolving women's problems and choose to work for women's equality in other ways. As our association has carefully studied his book, "A Lawyer Looks at the Equal Rights Amendment," we have found it to be not a book against women's rights but a close scrutiny of the effects of an amendment to the Constitution based on case studies of past interpretations of the courts. His objections to the ERA are based not on a desire to deny women equality but on a desire to offer them all the rights and opportunities to which they are entitled and which the ERA denies them.

As his record clearly shows, Rex Lee is a champion of women's rights. In our personal and professional dealings with him, he has been exceptional example of this in every way. We wholeheartedly support his nomination as Solicitor General of the United States.

Our next witness is Ms. Judy Lichtman. We are running a little short of time. If we could allow each of you 5 minutes, we would appreciate it.

TESTIMONY OF JUDITH LICHTMAN, WOMEN'S LEGAL DEFENSE FUND

Ms. LICHTMAN. I am Judith Lichtman. I am the executive director of the Women's Legal Defense Fund. Today, my testimony is on behalf of several groups: The American Association of University Women, Equal Rights Advocates, ERA America, National Federation of Business and Professional Women's Clubs, National Women's Political Caucus—Iris Mitgang as Chair is here to speak for the caucus—NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund.

As women's groups concerned with ending sex discrimination and securing equality for women under the law, we oppose the appointment of Rex Lee as Solicitor General for the following reasons.

Women, as citizens of the United States, comprise the greater proportion to be represented by the Solicitor General. These women have a right to expect that the number one lawyer for the U.S. Government, the man whose major responsibility is to uphold the law and the Constitution, has the utmost sensitivity to issues of women's rights. We have a right to expect that the person in the Office of Solicitor General is one in whom we can have the greatest confidence.

We ask that the Judiciary Committee closely scrutinize the nominee before it today in regard to issues of individual and civil rights, and that it carefully consider the position of the nominee in regard to women's issues. Because the Solicitor General is so influential in formulating and shaping the direction of the law, and because the Supreme Court has traditionally shown great respect for the office, we are concerned with the appointment of Rex Lee.

By formulating the position of the government in all cases reaching the Supreme Court, the Solicitor plays a unique role in developing that law which should not be underestimated. As the chief lawyer for the United States, he determines whether the government will request certiorari from the Supreme Court. The Court generally grants cert in about 80 percent of the cases requested by the Solicitor's office as compared to less than 10 percent requested by private litigants.

The Solicitor participates as amicus curiae in cases of major constitutional importance. He may use his position to raise issues and to suggest an analysis that enables the Court to reach a result that serves the public's interests.

In view of the central role of the Solicitor General as I have just described it above, it is crucial that this committee closely scrutinize the nominee before us today. The Senate must take particular care as it exercises this responsibility to advise and consent on this nomination.

As the top-ranking Justice Department lawyer who stands as the gatekeeper between the Government and the appellate courts and the person who articulates the Government's position before the Supreme Court, it is essential that the Solicitor's commitment to equal justice for women be beyond question.

Yet, where Rex Lee has spoken on equal justice issues, his insensitivity and misperception of the law concerning sex discrimination raises many questions. Lee's statement in this important area must be considered a serious bar to his confirmation.

Mr. Lee comes before this committee as an outspoken opponent to the ratification of the Equal Rights Amendment. He articulates his position in his recent book, "A Lawyer Looks at the ERA."

Dean Lee offers as a reason for his opposition to the ERA that the 27th amendment is not as necessary as it may have been 10 years ago. This overlooks the fact that the Supreme Court has not applied the same strict scrutiny test to gender discrimination that it has given to race, religion, and national origin.

However, when Dean Lee describes a rather well-developed and sophisticated body of law as having evolved since 1971, he incorrectly characterizes the unsettled doctrine that has emerged. Just this term, Justice Rehnquist stated with candor:

> As is evident from our opinions, the Court has had some difficulty in agreeing upon the approach in equal protection clause cases involving challenges to gender-based classifications.

This self-evident confusion has left lower Federal courts and State courts without guidance from the Supreme Court, causing one State supreme court justice to lament that there is no identifiable supreme law of the land by which lower courts may adjudicate a claim of alleged gender-based discrimination.

In short, that well-developed body of law praised by Dean Lee leaves sex discrimination complainants and defendents alike at the mercy of the subjective conclusions of the predominantly male judiciary, which without guidance attempts to resolve the individual cases before it.

The resulting flexibility that Dean Lee finds so desirable is the unpredictable chaos of a government of men and not laws. Indeed, Dean Lee even prefers leaving fundamental decisions concerning equality to the whim of "senior White House officials"—that is a quote from page 85 and 86 of his book—rather than have our Constitution speak directly and forcefully to secure equal justice under the law.

Mr. Lee sees us in a fine-tuning stage in the field of women's rights. He considers the ERA the sledgehammer approach. It is difficult indeed to see us in the fine-tuning stage when there are still laws in existence which prohibit women from working in certain occupations, give fathers priority over mothers as plaintiffs in action for wrongful death or injury of a child, authorize sex-based restrictions on the age of consent, restrict educational opportunities to women, and permit discriminatory lending practices.

Dean Lee evidently ignores these problems in his discussion, and shows a lack of sensitivity to the invidious sex discrimination that exists today in so many areas. His lack of sensitivity and his bias is particularly evident when he attributes to some or many people the belief that if recent judicial appointments had not been given to women, they would have gone to men who were more qualified. Dean Lee, by quoting these unnamed commentators without ever disassociating himself from them, strongly suggests that he subscribes to the theory.

Since it is this committee that has scrutinized and approved the exceptionally well-qualified women who are on the Federal bench, it knows well that the aspersions cast by Dean Lee are totally without foundation.

Ms. Mitgang is going to continue with the summary of the testimony.

The CHAIRMAN. Ms. Mitgang, we will give you 5 minutes, too.

TESTIMONY OF IRIS MITGANG, NATIONAL WOMEN'S POLITICAL CAUCUS

Ms. MITGANG. Thank you.

My name is Iris Mitgang and I chair the National Women's Political Caucus. The caucus is an organization of 55,000 members nationwide and is dedicated to the full participation of women in public life. Our priority is ratification of the equal rights amendment.

In addition, I am a practicing attorney and a law professor in the State of California. I have worked extensively in the fields of employment discrimination and family law.

In addition to the aforementioned evidence of general concern spoken to by Ms. Lichtman in regard to Dean Lee's appropriateness to serve as Solicitor General of the United States, in reviewing his recent book, Dean Lee misstates, and he does not appear to fully understand, the extensive history of the equal rights amendment hearings and the current state of sex discrimination law.

In his discussion of family law, although Dean Lee asserts that this area is the easiest in which to predict probable effects of the equal rights amendment, and that the effect of the equal rights amendment on alimony, child support, and custody will be to eliminate general presumptions favoring wives over husbands, thus requiring the courts to consider more carefully the facts of each individual case, he fails to clearly present the extent to which these results have already been achieved through State legislative reform in over 37 States.

Contrary to his argument that a case-by-case approach is preferable, Lee seems to imply that individual scrutiny of family law cases is bad and that the interests of the family are better served by allowing a more cursory examination of the facts.

After mentioning the U.S. Supreme Court's decision in *Orr* v. *Orr*, which invalidates under the equal protection clause a statute allowing alimony only for women, Lee identifies a potential short-range problem with alimony and child support that will be caused by the ERA: if existing State laws are held unconstitutional and States do not enact new legislation, some States might be left without any alimony or child support laws at all. He also questions whether judgments made under sex-based statutes would retroactively be declared invalid.

To the extent that either of these problems is real, it has already resulted from Supreme Court action under the 14th amendment. The equal rights amendment will not, as Dean Lee argues, exacerbate them.

Further, roughly 40 States had gender neutral alimony laws prior to the decision in *Orr*. Approximately 18 States place different child support burdens on fathers than mothers. By failing to sharply focus the changes that have already taken place and relying on a 1968 source for his data, Dean Lee would have us believe that the proverbial Pandora's box of spousal and child support obligations would be opened by the ERA, a belief that only one who ignores or misperceives the current state of the law can hold.

In his discussion of the impact of equal rights protection on domicile, Dean Lee fails to state that only a handful of States currently still require women to assume the domicile of their husbands. While the book discusses community property and the fact that all eight community property States have adopted the concept of equal management, the text is totally silent on rights in the common law property States which form a majority of the States in this country. It is in these States that the equal rights amendment is most needed to assure equality.

Lee also mentions that the ERA would require the focus in child custody decisions to be on whether, in each particular instance, children were in fact closer to the father or the mother. He describes current laws favoring the mother at least in the case of young children. In fact, this tender-years presumption has already been rejected in roughly 37 States.

Interestingly, Lee ignores the important issue of the impact of the ERA on marital property, an area in which the legislative history and the State ERA experience indicate that value is to be accorded to nonmonetary contributions made by the homemaker spouse in the provision of housekeeping and child rearing services.

Lee also ignores the fact that some rights, like the right to sue for damages for the loss of consortium heretofore available in some States only to men, have been extended under State equal rights provisions to women.

Lee puts at the heart of the risks of the result of ratification of ERA the mandatory repeal of all rape laws, the requirement of coeducational dormitories, and legalization of homosexual marriage. He gives no consideration to the State ERA cases that have uniformly rejected the view that the ERA requires a declaration of unconstitutionality of rape laws, thereby allowing the perpetrator of this violent crime to escape the consequence of his conduct. He gives the erroneous impression that the ERA would require massive changes in these areas.

In his discussion of sexually integrated publicly owned sleeping facilities, he concludes that under ERA State colleges and universities would be required to allow men and women to live together in dormitories. He ignores totally, however, the perspective of those who do not wish to have their privacy intruded upon by members of the opposite sex and the right to privacy since *Roe* v. *Wade* that has become a well-accepted legal right.

Constitutional scholar Lawrence Tribe concluded in reconciling the tension between these rights that it seems clear that whatever the precise parameter of the right of privacy, it would protect values of personal modesty in situations involving dress, sleeping, or performing bodily functions in the presence of the opposite sex.

Lee sees the ERA as an inflexible way of dealing with women's rights. In fact, it is clear that the ERA with its extensive legislative history is far from inflexible. Indeed, it is more predictable than the 14th amendment's equal protection clause. He ignores the experience of those 16 States which already have equality provisions in their own State constitutions.

The books'—Lee's—selective reading of the legislative history of the ERA, disregard of many State ERA cases, and the mischaracterization of the current state of the law reveal a somewhat disingenuous attempt at a dispassionate evaluation of the ERA. Therefore, they raise cause for concern.

Dean Lee describes his book as an objective lawyer's analysis. It is not. Instead, Lee develops arguments selectively to support his preordained conclusion that the ERA carries with it tremendous risks that are not worth running. Yet, Lee never apprises the reader of his bias, as legal scholars often do. Nor does he exhibit a careful, grounded legal research to support his opinion that is the hallmark of a legal scholar.

Certainly, his approach gives one cause to wonder whether Lee's biases will similarly intrude without warning and documentation and interfere with his role as Solicitor General.

In conclusion, his book shows an unacceptable bias and insensitivity which we, as groups concerned with equal protection under the law for women, see as a barrier to his appointment as Solicitor General.

We are concerned that because of this lack of sensitivity, he will not act to represent the public interests of over half of the United States public in regard to individual liberties and civil rights for all, in particular American women.

[Material follows:]

STATEMENT

American Association of University Women
Equal Rights Advocates
E R A America
National Federation of Business and Professional
Women's Clubs
National Women's Political Caucus
NOW Legal Defense and Education Fund
Women's Legal Defense Fund

at nomination of Rex Lee for Solicitor General of the United States

As women's groups concerned with ending sex discrimination and securing equality for women under the law, we oppose the appointment of Rex Lee as Solicitor General for the following reasons:

Women, as citizens of the United States comprise the greater proportion of the population to be represented by the Solicitor General. These women have a right to expect that the No. 1 lawyer for the United States govt., - the man whose major responsibility is to uphold the law, and the constitution - has the utmost sensitivty to issues of women's rights. We have a right to expect that the person in the Office of the Solicitor General is one in whom we can have the greatest confidence. We ask that the Judiciary Committee closely scrutinize the nominee before it today in regard to issues of individual and civil rights, and that it carefully consider the position of the nominee in regard to women's issues. Because the Solicitor General is so influential in formulating and shaping the direction of the law and because the Supreme Court has traditionally shown great respect for the Office, we are concerned with the appointment of Rex Lee.

By formulating the position of the government in all cases reaching the Supreme Court, the Solicitor General plays a unique role in developing the law, which should not be underestimated. As the chief lawyer for the United States, he determines whether the government will request certiorari from the Supreme Court. The Court generally grants cert in about 80% of the cases requested by the Solicitor General's Office as compared to less than 10% for private litigant requests.

The Solicitor General participates as amicus curiae in cases of major constitutional importance. He may use his position to raise issues and to suggest an analysis that enables the Court to reach a result that serves the public interests.

In order to accomplish this he provides the Court with information, he protects the government, and presents his own views on important constitutional questions. In this last respect, he may act as a partisan advocate of a specific argument of his own.

In view of the essential role of the Solicitor General (described above), it is crucial that this Committee closely scrutinize the nominee before it today. The Senate must take particular care as it exercises its responsibility to "advise and consent" on this nomination. As a top-ranking Justice Department lawyer who stands as the gatekeeper between the government and the appellate courts and the person who articulates the government's position before the Supreme Court, it is essential that the Solicitor General's commitment to equal justice for women be beyond question. Yet, where Rex Lee has spoken on equal justice issues, his insensitivity and misperception of the law concerning sex discrimination raises many questions. Lee's statement in this important area must be considered a serious bar to his confirmation.

Rex Lee comes before this committee as an outspoken opponent and the ratification of the ERA. He articulates his position in his recent book A Lawyer Looks at the ERA.

Lee offers as a reason for his opposition to the ERA that the 27th Amendment is not as necessary as it may have been 10 years ago because the problems of discrimination against women have been and are being taken care of by the 14th Amendment's equal protection clause. This overlooks the fact that the Supreme Court has not applied the same strict scrutiny test to gender discrimination that it has given to race, religion and national origin. With respect to the equal protection clause, Lee acknowledges both the history of the Equal Rights Amendment, which was intended to protect women, and the fact that 1971 marked the first time the United States Supreme Court relied on the federal constitution to invalidate sex-based discrimination against women. However, when Lee describes a "rather well developed and sophisticated body of law" (p.30) as having evolved since 1971, he incorrectly characterizes the unsettled doctrine that has emerged. Just this term, Justice William Rehnquist stated with candor: "as is evident from our oponions, the Court has had some difficulty in agreeing upon the proper approach in [equal protection clause] cases involving challenges to gender-based classifications."1/ This self-evident confusion has left lower federal courts and state courts without guidance from the High Court, causing one state supreme court judge to lament that there is "no identifiable 'supreme law of the land' . . . by which (lower courts) may adjudicate a claim of alleged gender-based discrimination." 2/

In short, the "well developed" body of law praised by Dean Lee leaves sex discrimination complainants and defendants alike at the mercy of the subjective conclusions of the predominently male judiciary, which, without guidance, attempts to resolve the individual cases before it. The resulting "flexibility" that Lee finds so desirable is the unpredictable chaos of a government of men, not laws. Indeed, Lee even prefers leaving fundamental decisions concerning equality to the whim of "senior White House officials" (p. 85-86) rather than have our constitution speak directly and forcefully to secure equal justice under the law.

Lee sees us in a "fine tuning stage" in the field of women's rights, and he considers the ERA the sledge hammer approach. It is difficult indeed to see us in the fine tuning stage when there are still laws in existence which prohibit women from working in certain occupations,[3] give fathers priority over mothers as plaintiffs in action for wrongful death or injury of a child,[4] authorize sex-based restrictions on the age of consent,[5] restrict educational opportunities to women,[6] and permit discriminatory lending practices.[7]

Rex Lee evidentally ignores these problems in his discussion, and shows a lack of sensitivity to the invidious sex discrimination that exists today in so many areas. His lack of sensitivity and his bias is particularly evident when he attributes to "some" or "many" people the belief that if recent judicial appointments had not been given to women, they would have gone to men who were more qualified. (p.85) Lee, by quoting these unnamed comentators without ever dissassociating himself from them, strongly suggests that he subscribes to the theory. Since this committee has scrutinized and approved the exceptionally well qualified women who are on the federal bench, it knows well that the aspersions cast by Lee are totally without foundation.

Lee misstates, and doesn't appear to fully understand the extensive history of the ERA hearings and the current state of sex discrimination law.

In his discussion of family law, although Lee asserts that this area is the "easiest in which to predict probable effects of the Equal Rights Amendment" and that the effect of the ERA on alimony, child support and custody will be to "eliminate general presumptions favoring wives over husbands, thus requiring the courts to consider more carefully the facts of each individual case," [p.69] he fails to clearly present the extent to which these results have already been achieved through state legislative reforms and/or review under the equal protection clause, further, contrary to his argument that a case-by-case approach is preferable, Lee seems to imply that individual scrutiny of family law cases is bad and that the interests of the family are better served by allowing a more cursory examination of the facts.

After mentioning the U. S. Supreme Court's decision in *Orr v. Orr*, which invalidates under the equal protection clause statute allowing alimony only for women, Lee identifies a "potential short range problem" with alimony and child support that will be caused by the ERA: if existing state laws are held unconstitutional and states do not enact new legislation, some states might be left without any alimony or child support laws at all. He also questions whether judgments made under sex-based statutes would retroactively be declared invalid. To the extent that either of these problems is real, it has already resulted from Supreme Court action under the 14th Amendment; the Equal Rights Amendment will not--as Lee argues--exacerbate them. Further, roughly 40 states had gender neutral alimony laws prior to the decision in *Orr*,[8] and only approximately 18 states place different child support burdens on fathers than mothers. By failing to sharply focus the changes that already have taken place and relying on a 1968 source for his data, Lee would have us believe that the proverbial Pandora's box of spousal and child support obligations would be opened by the ERA, a belief that only one who ignores or misperceives the current state of the law can hold.

In his discussion of the impact of equal rights protection on domicile, Lee fails to state that only a handful of states currently still require women to assume the domicile of their husbands. And, while the book discusses community property and the fact that all eight community property states have adopted the concept of equal management, the text is totally silent on rights in the common law property states which form a majority of this country--it is in these states that the Equal Rights Amendment is most needed to assure equality.

Similarly, although Lee discusses spousal surnames as a significant area that will be affected by the ERA, he fails to mention the fact that only one state still requires a married woman to adopt her husband's surname. [9]

Lee also mentions that the ERA would require the focus in child custody decisions to be on whether, in each particular instance, children were in fact "closer" to the father or the mother. He describes current law as favoring the mother at least in the case of younger children. But, in fact, this "tender-years presumption" has already been rejected in roughly 37 states.

Interestingly, Lee ignores the important issue of the impact of the ERA on marital property, an area in which the legislative history and the state ERA experience indicate that value is to be accorded to non-monetary contributions made by the homemaker spouse in the provision of housekeeping and child rearing services. Lee also ignores the fact that some rights, like the right to sue for damages for loss of consortium, heretofore available in some states only to men, have been extended under state equal rights provisions to women.

Lee puts at the heart of the risks of the result of ratification of ERA the mandatory repeal of all rape laws, the requirement of coeducational dormitories and legalization of homosexual marriage. He gives no consideration to the state ERA cases that have uniformly rejected the view that the ERA requires a declaration of unconstitutionality of rape laws, thereby allowing the perpetrator of this violent crime to escape the consequence of this conduct. He gives the erroneous impression that the ERA would require massive changes in these areas.

In his discussion of sexually integrated publicly owned sleeping facilities, he concludes that under ERA, state colleges and universities would be required to allow men and women to live together in dormitories. Lee totally ignores, however, the perspective of those who do not wish to have their privacy intruded upon by members of the opposite sex. As an expert, should he not be well aware that the right to privacy, at least since Roe v. Wade, has become a well accepted right. The highly respected constitutional scholar Lawrence Tribe concluded in reconciling the tension between these rights that "it seems clear that whatever the precise parameter of [the privacy right], it would protect values of personal modesty in situations involving undressing, sleeping or performing bodily functions in the presence of the other sex."

Lee sees the ERA as an inflexible way of dealing with women's rights. In fact, it is clear that the ERA with its extensive legislative history, is far from inflexible, and is indeed more predictable than the 14th Amendment's equal protection clause.

The book's selective reading of the legislative history of the ERA, disregard for many state ERA cases, and the mischaracterization of the current state of the law reveal a somewhat disingenuous attempt at a dispassionate evaluation of the ERA and, therefore, raise cause for concern.

Dean Lee describes his book as "an objective lawyer's analysis." It is not. Instead, Lee develops arguments selectively to support his preordained conclusion that the ERA carries with it tremendous risks that are "not worth running." Yet, Lee never apprises the reader of his bias, as legal scholars often do. Certainly this approach gives one cause to wonder whether Lee's biases will similarly intrude without warning and interfere with his role as Solicitor General.

In conclusion, his book shows an unacceptable bias and insensitivity which we, as groups concerned with equal protection under the laws for women, see as a barrier to his appointment as Solicitor General. We are concerned that because of this lack of sensitivity, he will not act to represent the public interest in regard to individual liberties and civil rights for all. The Solicitor General may act as a partisan advocate of a specific point of view and present his views on important constitutional questions. We ask the committee to carefully consider whether Rex Lee, in view of his opinions on sex discrimination and the ERA, is the best qualified person to act as the number one lawyer for the government in the coming years--years in which, no doubt we will see important cases coming up which will possibly be directed to the Supreme Court by the influence of the Solicitor General. We are very concerned that we not lose ground after years of hard work that have gone into guaranteeing women their rightful place in society.

We ask that the committee reject this appointment of the Solicitor General.

1/ Michael M. v. Superior Court, Sen. County, 101 S.Ct. 1200 (1981)

2/ Wengler v. Druggists Mutual Insurance Company, 583 S.W. 2d 162, 168 (Mo. Sup. Ct. 1979) (Donnelly, J., concurring), rv'd 101 Supreme Court 1540 (1980).

3/ Ohio Rev. Code Ann. §§ 4107.43 (Anderson 1973).

4/ Thorne v. Oden, 349 So.2d 1136 (Ala. Sup. Ct. 1977).

5/ Ark. Stat. Ann. §55 - 102 (Supp. 1979): La. Civ. Code Ann. art. 92 (1972); Miss. Code Ann. § 93-1-5(d) (1972).

6/ Vorcheimer

7/ See Women in the World, a Ford Foundation Position Paper 14 (Nov. 1980).

8/ Freed & Foster, Divorce in the Fifty States: An Overview, 14 Fair. L.Q. 229, 252-53 (Winder 1981).

9/ Morbush v. Wallace, 341 F.Supp. 217 (M.D. Ala. 1971), aff'd 405 U.S. 970 (1972).

The CHAIRMAN. Thank you, Ms. Mitgang.

Ms. Smeal, we will hear from you.

TESTIMONY OF ELEANOR SMEAL, NATIONAL ORGANIZATION FOR WOMEN

Ms. SMEAL. I am Eleanor Smeal. I am the national president of the National Organization for Women. As president of NOW, I represent 140,000 members nationwide. We are the largest membership organization in the United States dedicated to advancing the legal, economic, social, and political rights of women. We appreciate the opportunity to appear before the committee today to express our opposition to the administration's designee for Solicitor General of the United States, Dean Rex Lee.

In presenting our testimony, we are joined and give testimony on behalf of the following groups: American Veterans Committee, Catholics Act for ERA, Coalition of Labor Union Women, Democratic Agenda, Gray Panters of Metropolitan Washington, Homemakers for ERA, Mexican-American Women's National Association, Mormons for ERA, National Association of Social Workers, National Student Education Fund, Rural American Women, and Women's Equity Action League.

The names of these organizations were not previously submitted. I would like to submit that document with my statement.

I will try to summarize our extensive testimony because it would take longer than 5 minutes to read.

We are very mindful of the importance of the Solicitor General's office. We are opposing the appointment on three principal factors: Dean Lee's close association with Mountain States Legal Foundation and its goals, his record as a dean at Brigham Young University Law School vis-a-vis women and minorities, and his ill-conceived opposition to the equal rights amendment.

Until his resignation last month, Dean Lee was an active member of the board of litigation of the Mountain States Legal Foundation.

Dean Lee has stated here today and previously that he is committed to equal rights for women. We feel that the only way one can really judge this is by looking at a person's record.

As a member of the Mountain States Legal Foundation, he has endorsed its goals. The mandate of this foundation is to meet the challenges made by extreme environmentalists, no growth advocates, and excessive government. In keeping with its restrictive view of the world, the great bulk of litigation of this foundation seeks to gain control of the public resources for the benefit of private interests and opposes the equal rights of women and minorities.

We have looked at some of the cases and we state in our testimony that we are very concerned. We give examples. Its positions on issues important to women are demonstrated by the following cases. The MSLF has sought to cripple title 9 by opposing the most effective means of its enforcement, the withholding of Federal funds to institutions that will not promise to abide by its requirement of equality.

The foundation has opposed all affirmative action and quota systems as being unconstitutional, irrespective of prior discriminatory practices or the need to remedy them.

This foundation is an affiliated foundation with six other foundations. When you look at the record, they are very concerned with the issue of reverse discrimination and tend to represent the interests of corporations to break affirmative action and the promotion of affirmative action programs for women and minorities.

They have also challenged as unconstitutional ERA contract set asides for women-owned businesses. We also feel that it is most revealing that the MSLF has taken the side of the legislators who are fighting the ERA extension and who are promoting recision of the ERA.

We do not believe that organizations such as the Mountain States Legal Foundation litigate in a vacuum. I myself am a member of such a board or foundation. Of course, we, as the foundation that we are testifying about, establish a litigation policy that is in keeping with our purposes. We believe that this litigation policy and the goals of the MSLF and its affiliates speak volumes as to the lack of concern or commitment to women's rights by Dean Lee.

We cannot seriously expect from Dean Lee a commitment any different in substance or kind than that he has already demonstrated through his participation in the affairs of this foundation and its affiliate foundations.

We believe that this foundation and affiliate foundations will have a great many cases that could perhaps go to the appellate level. We know Mr. Lee has not offered to recuse himself from such matters in which the cases that the MSLF and its affiliates are involved. Rather, he has said he will deal with it on a case-by-case basis.

We feel that it is not relevant whether he took part in a particular case because each case of these affiliates and the MSLF itself are part of a greater litigation policy and strategy, the formation of which he had to have taken part. In other words, he participated in the formation of such policy.

In essence though, the whole question of disqualification is a difficult one for Solicitor General because we are not talking about a group or position in which you can simply recuse yourself. We are talking about a position that is essentially administrative and in which the other people working in the office are essentially subordinates to the position. Therefore, disqualification itself does not answer the fact that he is supervising and taking part in the entire policy of the Department.

We also looked at Dean Lee's performance as the first and only dean of Brigham Young University Law School. This has come up in the questioning today. Although he may have encouraged or doubled the attendance of women from what it was initially to what it is now, the percentage of women enrolled at this school appears by our study to be the lowest in the Nation, a mere 16 percent.

As far as his employment of women, there is only one woman on the faculty, a mere 4 percent of the total. The national average is 10 percent. He is significantly off in both totals, which demonstrates again a lack of substantial commitment to the issue of women's rights. Again, we say that performance speaks much louder than words.

In looking at his writings, we join in with the previous statement, but I would like to call attention to one section of the book which I find most alarming. It is a section on minimum wages for women. I had to read that section several times. I have heard a lot of reactionary proposals for females and for solving the present discrimination against women, but this beats all.

I have not heard in recent times anybody seriously consider a subminimum wage for women alone. Yet in this analysis or in this section of the book, he says he is against the ERA. He writes very carefully. Everything is quite tentative. However, essentially what a reasonable reader can come away with is the following conclusion: That the equal rights amendment could be harmful to promoting women's employment because it would prohibit a subminimum wage for women only. After all, some women would have only to offer for employment the fact that they were willing to work for less and this would deny them the right to work for less.

I hardly think this is something we should be concerned about in solving the problem of employment for women, but it shows his lack of concern and his insensitivity to real solutions for both closing the wage gap for women and the fact that you could even defend in the 1980's a separate standard of minimum wage for women over men.

We could go through the book passage by passage, but we believe that his performance in employment, in recruiting of women at the school, his performance and the goals of the foundations that he has worked in, and also his writings indicate such a profound insensitivity to the needs of women that he should be opposed vigorously in this nomination for Solicitor General.

[Material follows:]

National Organization for Women, Inc.
425 13th Street, N.W. Suite 1048 Washington, D.C. 20004 • (202) 347-2279

June 19, 1981

The attached testimony being presented by Eleanor Smeal, President of the National Organization for Women, is also given on behalf of:

American Veterans Committee

Catholics Act for ERA

Coalition of Labor Union Women

Democratic Agenda

Gray Panthers of Metropolitan Washington

Homemakers for ERA

Mexican-American Women's National Association

Mormons for ERA

National Association of Social Workers

National Student Education Fund

Rural American Women

Women's Equity Action League

Also joining in this testimony as an individual is Dr. Donna Allen, who is Director, Women's Institute for Freedom of the Press.

My name is Eleanor Smeal, and I am President of the National Organization for Women (NOW). As President of NOW, I represent 140,000 members nationwide. We are the largest membership organization in the United States dedicated to advancing the legal, economic, social, and political rights of women. We appreciate the opportunity to appear before the Committee today to express our opposition to the Administration's designee for Solicitor General of the United States: Dean Rex Lee of the Brigham Young University Law School.

Because NOW is regularly engaged in litigation in support of its goals of equal rights and opportunities for women, we are particularly aware of the importance of the office to which Dean Lee has been nominated. Other than a Justice of the Supreme Court, no one person has (or is capable of having) as great an impact upon the development of constitutional and federal law as is the Solicitor General. This is so because the Solicitor General is totally responsible for the conduct of litigation (and the establishment of litigation policy) of the United States before the Supreme Court. Indeed, the office of Solicitor General is so highly respected by the members of the Court that it grants certiorari in 80 percent of all cases which the Solicitor General brings before it. Moreover, the Solicitor General's views are frequently requested by the Court in non-governmental cases raising constitutional and federal issues. The authority and responsibility of the Solicitor General are not limited to practice before the Supreme Court. All appeals filed by the United States (and by most of its agencies) must be approved expressly by him.

Because his authority is so pervasive, the Solicitor General is in a uniquely powerful position to influence the body of law concerning women's rights. NOW is seriously concerned that the nomination of Dean Lee will ultimately result in the substantial undermining of the progress for which we have fought so hard over the past decade. We believe that Dean Lee has demonstrated a significant bias (or extreme insensitivity to) equal rights for women. Our opposition is based principally on three factors: (1) Dean Lee's close association with the Mountain States Legal Foundation and its goals; (2) his record as dean of the Brigham Young University Law School, vis-a-vis women and minorities; and (3) his ill conceived opposition to the Equal Rights Amendment.

Until his resignation last month (following announcment of his nomination), Dean Lee had been an active member of the Board of Litigation of the Mountain States Legal Foundation (MSLF). The MSLF, which is a part of a network of organizations affiliated with the National Center for the Public Interest, acts as a "public interest" law firm espousing the economic views and political concerns of its large corporate contributors. Contributors include the Exxon Corporation, Adolf Coors Corporation, ASARCO, Inc., Phelps Dodge Corporation, and several utilities. Its former chairman, Joseph Coors, expressed the MSLF's mandate as being one designed to "meet the challenges made by the extreme environmentalists, no-growth advocates, and excessive government."

In keeping with its restricted view of the world, the great bulk of MSLF litigation (all of which Dean Lee has voted upon) seeks to gain control of public resources for the benefit of private interests and opposes the equal rights of women and minorities. Its position on issues important to women is demonstrated by the following:

- The MSLF has sought to cripple Title IX by opposing the most effective means of its enforcement, the withholding of federal funds to institutions that will not promise to abide by its requirement of equality.
- The MSLF has (in Delio v. The University of Colorado Law School) opposed all affirmative action and quota systems as being unconstitutional irrespective of prior discriminatory practices or the need to remedy them.
- An MSLF affiliated foundation has opposed as unconstitutional EPA contract set-asides for women-owned businesses.

The most revealing position which the MSLF has taken is, of course, its challenge to Congress's 1978 extension of the time period for ratification of the Equal Rights Amendment and its support of the Idaho Legislature's attempted rescission of its ratification of the Amendment (Idaho et. al., v. Freeman et. al.).

Organizations such as the Mountain States Legal Foundation do not litigate in a vacuum. They approach litigation with an overall strategy and purpose in mind. I am on the Board of such a foundation (the NOW Legal Defense and Education Fund), and this is how we choose our cases. When one looks at the MSLF's challenge to the ERA in the context of its other litigation and general philosophy of opposing women's rights, one can only conclude that the ERA litigation is far more than an abstract question dealing with amendatory procedure. It is simply an overt attempt to frustrate the desires of millions of American women to obtain recognition of their equal rights in the fundamental governing document of our nation. Dean Lee's continued participation in the activities of the MSLF speaks volumes as to his lack of concern with or commitment to the rights of women. We cannot seriously expect from Dean Lee a commitment any different in substance or kind than that he has demonstrated through participation in the affairs of the MSLF.

As I have previously noted, the MSLF's major objective is to further the interests of its corporate contributors in opposing legitimate government activities in the enforcement of federal statutes and regulations. Dean Lee has not only identified himself with this organization and its affiliates, but, as a member of its Board of Litigation since its inception, has also worked to shape its anti-government policies. No one questions his right to do so as a lawyer and as a private citizen. But, it is another matter to approve of his appointment to an office which has discretion to enforce the very statutes, regulations, and policies which he opposed and which remain the law of the land. It is a legitimate inquiry for this Committee to determine whether these circumstances render Rex Lee unfit to serve as Solicitor General.

We understand that Rex Lee has offered to recuse himself from several matters including the ERA ratification period case. However, he has not offered to withdraw from the large number of other cases in which the MSLF and its affiliates are involved. Recusal, in any event, is not the solution since the ultimate responsibility for Supreme Court litigation is vested in the Solicitor General; all others in that office are subordinate and are under his direction and control. The propriety of Lee's participation in numerous cases stemming from his association with the MSLF will continue to arise. In this situation, recusal is not the solution; what is required is this Committee's disapproval.

Dean Lee's performance as the first and only dean of the Brigham Young University Law School also concerns us greatly. During his tenure he demonstrated no serious commitment to (or concern with) the involvement or advancement of women in his own profession. The percentage of women enrolled at his school appears to be the lowest in the nation, a mere 16 percent (73 women in a student body of 456 according to the law school admissions office). This rate is less than half the national average (33 percent). Only one woman is a member of the Brigham Young Law School faculty, 4 percent of the total. This figure contrasts poorly with the national average of 10 percent.

The record clearly shows that Dean Lee did little to recruit, provide support, or create an atmosphere conducive to women's participation in the Brigham Young University Law School. Dean Lee's writings further underscore our concern. In his book, A Lawyer Looks At the Equal Rights Amendment, Lee seeks to give the impression that, notwithstanding his strong opposition to ERA, he actually favors equal rights for women but prefers to promote that objective through application of the equal protection clause of the 14th Amendment. Lee's judgement in this respect is so patently in error that it can only mask an actual bias against women's rights.

Lee asserts that he does not oppose the objectives of the ERA but fears that a separate amendment will create confusion and extensive litigation. Every major piece of legislation is productive of litigation and requires interpretation and application. Such a prospect has never been regarded as a sound reason for rejecting legislation, let alone a constitutional amendment.

Dean Lee's argument that women should rely upon the equal protection clause rather than the ERA cannot be equated with support for equal rights. Lee recognizes that gender, as a classification subject to judicial scrutiny, is only a recent development and that the concept of equal rights for women had been rejected through most of our constitutional history. Reed v. Reed, 404 US 71 (1971); Frontiero v. Richardson 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976).

Since these decisions were rendered, the advancement of women's rights has not been a matter of steady progress. Rather there has been a virtual checkerboard of results and standards of review. Frequently, the results of women's rights litigation are determined only by the vagaries of a particular group of judges or a narrow set of circumstances. On more than one occasion, the rights of women have failed to advance or have been set back.

In contrast to the uncertainty of standards applicable to sex discrimination issues under the Fourteenth Amendment, racial discrimination cases are decided generally on the basis of a single standard and receive the most stringent judicial review. Surely, Dean Lee should have recognized that the ERA offers a far more consistent and predictable result than the patchwork of standards dealing with sex discrimination under the Fourteenth Amendment. He should also have recognized that, regardless of ERA, litigation in the eighties on the issue of equal rights will be quite extensive. If litigation is not in the context of the ERA, it will be litigated under the vague standards applicable to the Fourteenth Amendment with its varying degrees of scrutiny and uncertainty of results. For these reasons there is good cause to question Lee's professed support for equal rights.

The testimony submitted on behalf of several women's legal rights groups carefully analyzes Dean Lee's book on the ERA and points out its significant errors and distortions. We fully agree with these views. At first glance, his book appears to present a serious study. It is, however, by no means an objective appraisal. It is, in essence, a mass of error, omission, and distortion unworthy of a candidate for the position of Solicitor General of the United States.

Lee claims that adoption of the ERA may lead to the invalidation of rape laws or the promotion of homosexuality. His purpose in raising these matters is not to enlighten but rather to frighten and intimidate. Lee supports his views by relying almost exclusively upon the statements of hostile witnesses at Congressional hearings and the rejected views of opponents. He utterly disregards and ignores the clear and definitive legislative history contained in the Committee Reports.

One example of this distortion is Lee's discussion of the effect of the ERA on homosexual rights. While NOW opposes discrimination on the basis of sexual preference, the legislative history clearly states that ERA does not address this issue. In his book Lee relies upon a student law review note published subsequent to passage. The clear thrust of the debate on the Senate floor, however, was exactly to the contrary of the position he sought to support:

> The Equal Rights Amendment would not prohibit
> a State from saying that the institution of
> marriage would be prohibited to men partners.

> It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgement that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a a woman - or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man. (118 Cong. Rec. S4839) (Senator Bayh)

If Lee's statement about the implications of the ERA on homosexual rights were correct, Title VII of the Civil Rights Act of 1964 would prohibit discrimination in employment because of sexual preference. Laws prohibiting discrimination in housing and credit because of sex would also prohibit discrimination because of sexual preference. To our knowledge, no one has made such a claim; certainly, no court has reached this conclusion. Indeed, no court has ever interpreted a state ERA as requiring such results.

A second example of Lee's distortions is his suggestion that adoption of the ERA would invalidate rape laws. This claim is clearly controverted in the Committee Reports. As Senator Bayh noted:

> The Amendment will not invalidate laws which punish rape, for such laws are designed to protect women in a way they are uniformly distinct from men ... that is one area in which I have agreement with the scholars who wrote that article when they said that rape laws would continue to be valid after the ratification of the equal rights amendment. (Bayh S9536)

In our view, this selective approach to the use of legislative history not only demonstrates a lack of scholarship but, more importantly, evidences a basic hostility to the attainment of equal rights.

Dean Lee's discussion in his book of the application of the minimum wage laws to women requires special mention. He suggests that the principal beneficiaries of minimum wage laws are the more highly skilled workers because the only advantage that a "marginal unskilled" worker has is her willingness to work for less money. Lee then criticizes the minimum wage laws because they take away that so-called "advantage" of the "right" to work for less.

The minimum wage for all employees is the first step towards equality of economic opportunity. Indeed this principal has been a fundamental tenent of the economic system for almost 50 years. The current wage issues facing the courts -- such as the issue of comparable worth -- have gone far beyond this basic principal. When one considers this development, Dean Lee's questioning of the need for minimum wage laws for women is extremely disquieting. It further discloses a fundamental bias against women's rights.

CONCLUSION

Dean Lee's record discloses a fundamental commitment to large corporate interests and an opposition to government's enforcement of statutes and regulations designed to serve the public interest. Most significantly -- and despite his assertions to the contrary -- this record also discloses an insensitivity to the advancement of women's rights. For these reasons, Dean Lee should not be confirmed as Solicitor General.

The CHAIRMAN. Thank you, Ms. Smeal.

I believe that completes the panel. We thank you ladies for your appearance.

Are there any more witnesses?

[No response.]

The CHAIRMAN. There appear to be none.

Mr. Lee, would you care to respond at all to what has been said?

Mr. LEE. Just briefly.

In a sense, I guess, it has been unfortunate that the only concentration has been on one issue involving a proposed constitutional amendment which, if it comes before the Office of the Solicitor General at all, is likely to come before it only in a limited number of cases.

Yet, I can understand this. I understand that the leaders of the women's groups who have appeared before you today have been involved in a long fight. It is a battle with whose end objectives I completely agree.

I end where I began. I do agree with those objectives. In the event that this committee and the Senate should see fit to confirm me, you will find in me a vigorous advocate for the defense of those statutes which this Congress would pass guaranteeing the ultimate objective of equal rights for women, which I support.

My only objection to the equal rights amendment is simply a disagreement that that particular proposed constitutional amendment is the way to bring that about.

It has been somewhat painful for me, Mr. Chairman, to listen to my views characterized this afternoon. Those are not my views. There is a temptation, one to which I will not yield, to go down through point by point and say exactly what it was that I meant in that book. I do not think that is necessary.

Suffice it to say that as an experienced lawyer, I know that whether I am responding to a brief or a book or anything else, it is possible for the advocate to take a position in opposition to another advocate's position.

I respect the views of those who have testified here. I hope that they respect mine. I wish that they would. As an advocate, I respect their advocacy position.

However, I would ask that the committee recognize what has been said as being in the realm of advocacy. In no way did I mean to suggest in that book or any other that women are or should be entitled to less pay because they are women. That is the furthest thing from any objective that I have ever held.

I pledge to you, to these leaders who have appeared here before you this afternoon, to all women of America, and to all people of America that if confirmed as Solicitor General of the United States, I will to the best of my ability defend the Constitution of the United States and work to achieve the interests of the United States. One of those interests in my view is the achievement of equality for women and the proper place of women in our society, one to which they have been too long denied.

The CHAIRMAN. Does that complete your statement now?

Mr. LEE. It does, Mr. Chairman. Thank you.

The CHAIRMAN. Since there are no other witnesses now to be heard on either side, without objection, a statement by the National Education Association will be placed in the record.

[Material follows:]

nea
NATIONAL EDUCATION ASSOCIATION • 1201 16th St., N.W., Washington, D C 20036 • (202) 833-4000
WILLARD H. McGUIRE, President
BERNIE FREITAG, Vice President
MARY HATWOOD FUTRELL, Secretary-Treasurer
TERRY HERNDON, Executive Director

STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION ON THE NOMINATION OF REX E. LEE AS SOLICITOR GENERAL OF THE UNITED STATES

The National Education Association, representing more than 1.7 million public school employees nationwide, has strong reservations over the nomination of Rex E. Lee to be Solicitor General of the United States.

The NEA is deeply concerned that Mr. Lee would not be able to override his expressed biases about the lives of one-half of America's population and treat the office of Solicitor General with the evenhandedness necessary to make sound judgments. We respectfully request that Mr. Lee's recent book[1] (which is generally unavailable at bookstores) be entered into the official record of this hearing.

Function of the Solicitor General

The office of Solicitor General is uniquely important to the enforcement of law. The fact that the United States Supreme Court grants certiorari in about 80 percent of the cases brought by the Solicitor General compared to roughly five percent for other attorneys demonstrates the sweeping respect provided the Solicitor General by the Justices of the U. S. Supreme Court. The Solicitor General's ability to intervene on behalf of the federal government in any case before the U. S. Supreme Court which has constitutional impact and the credibility traditionally assigned by the Court to that office's amici curiae exemplify the power and stature of the office.

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[1] A Lawyer Looks at the Equal Rights Amendment, Brighman Young University Press, Provo, Utah 1980.

Additionally, the Solicitor General has the authority to determine which cases to pursue and which to drop. The Solicitor General may concede error of the federal government and settle cases without adjudication. The choice of Solicitor General is critical to the legal and constitutional framework, of the Unites States of America. .

The Solicitor General-Designate and Women's Rights

Mr. Lee is an outspoken opponent of the Equal Rights Amendment. His book, A Lawyer Looks at the Equal Rights Amendment, demonstrates an unyielding opposition to the concept of guaranteeing equal rights for women under the Constitution. His entire book emphasizes a bias which is stated repeatedly and is summarized in this quote:

> "Neither for this generation nor for those that will follow is it in our national interest to cut off debate on that issue by making unconstitutional government's power to prefer women." (p. 85)

The statement is astonishing and appalling. The corollary is that government has the power to prefer men. To NEA, government preference of one sex over the other, simply on the basis of sex, is completely unacceptable as the policy of this nation. Yet it is clearly Mr. Lee's bias.

The Equal Rights Amendment would provide the constitutional means to eradicate at least official governmental implementation of this bias and it is before the people for ratification. It is possible that issues surrounding ERA rescission and extension would come before Mr. Lee if he were confirmed as Solicitor General.

Mr. Lee states further the ERA is potentially a massive change while what is needed is government flexibility to deal with equality for women.

> "Regardless of where we were ten years ago, or thirty years ago, or a hundred

> years ago, today we are at the fine-tuning stage. The need is for careful case-by-case examination of whether and to what extent men and women should be treated differently. A constitutional amendment, very simply, is not a fine-tuning instrument. It has more the qualities of a sledgehammer." (p. 85)

NEA disagrees. If equal treatment of American citizens depends upon flexibility, or to put it another way, governmental whim, there is no guarantee of equal rights for all persons -- or for any -- in the United States.

Conclusion

Since Mr. Lee has chosen to take a strong public stand in opposition to the Equal Rights Amendment which will come before him if confirmed, he has effectively disqualified himself as Solicitor General and we respectfully ask that he withdraw himself from consideration. If he declines we urge the Committee to recommend disapproval of the nomination.

The CHAIRMAN. Further, a statement by the distinguished Senator from Kansas, Senator Bob Dole, will be placed in the record.

We will keep the record open through Tuesday at 5 p.m. If anyone else has any statements, we will be glad to have you submit them.

I believe that now completes the hearing. We will now stand adjourned.

[The committee adjourned at 4:10 p.m.]

[The following statements and correspondence were subsequently supplied for the record:]

STATEMENT OF SENATOR BOB DOLE
ON
THE NOMINATION OF REX E. LEE

MR. CHAIRMAN, TODAY THE SENATE JUDICIARY COMMITTEE WILL CONSIDER THE NOMINATION OF REX E. LEE FOR THE POSITION OF SOLICITOR GENERAL OF THE UNITED STATES. UNDER THE CONSTITUTION THE SENATE HAS THE RESPONSIBILITY TO ADVISE AND CONSENT TO THIS NOMINATION. THE POSITION OF SOLICITOR GENERAL IS A PARTICULARLY IMPORTANT ONE BECAUSE THE SOLICITOR GENERAL IS RESPONSIBLE FOR ALL GOVERNMENT LITIGATION BEFORE THE SUPREME COURT AND IS THE INDIVIDUAL WHO MUST APPROVE ALL APPEALS OF CASES DECIDED AGAINST THE GOVERNMENT IN THE LOWER COURTS. IN ESSENCE, HE IS THE GOVERNMENT'S LAWYER. IN LIGHT OF THE BURGEONING ROLE OF GOVERNMENT THIS IS NO SMALL TASK.

MR. LEE HAS A PARTICULARLY DISTINGUISHED BACKGROUND. HE GRADUATED FROM BRIGHAM YOUNG UNIVERSITY AND RECEIVED HIS LAW DEGREE FROM THE UNIVERSITY OF CHICAGO, WHERE HE STOOD AT THE TOP OF HIS CLASS. HE CLERKED FOR SUPREME COURT JUSTICE BYRON WHITE. MR. LEE RETURNED TO BRIGHAM YOUNG UNIVERSITY, AFTER PRACTICING LAW, TO SERVE AS DEAN OF THE LAW SCHOOL. HE WAS THE ASSISTANT ATTORNEY GENERAL AND CHIEF OF THE CIVIL DIVISION OF THE JUSTICE DEPARTMENT.

MR. CHAIRMAN, AS YOU CAN SEE FROM THIS THUMB-NAIL SKETCH, THE MAN WHO SITS BEFORE THIS PANEL HAS AN IMPRESSIVE RECORD. THERE ARE SOME GROUPS THAT QUESTION HIS VIEWS ON WOMEN'S ISSUES. IN THE PAST, I HAVE SUPPORTED THE ENACTMENT OF THE EQUAL RIGHTS AMENDMENT. CONSEQUENTLY, I WILL LISTEN WITH GREAT INTEREST TO MR. LEE'S TESTIMONY. ONE OF THE VERY FOUNDATIONS OF OUR SYSTEM OF GOVERNMENT IS THAT ALL OF OUR CITIZENS SHOULD HAVE AN OPPORTUNITY TO DIFFER AND EXPRESS THOSE DIFFERENCES. I AM CERTAIN AT THE END OF THESE CONFIRMATION HEARINGS ALL SIDES WILL HAVE HAD AN OPPORTUNITY TO FULLY AIR THEIR VIEWS.

MR. LEE, WELCOME TO OUR COMMITTEE.

TELEPHONE 703-536-9321

CATHERINE EAST
LECTURER-CONSULTANT
WOMEN'S RIGHTS

5212 NORTH 32ND STREET
ARLINGTON, VIRGINIA 22207

June 21, 1981

Chairman, Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I ask that this letter be entered in the record of the hearings on the nomination of Rex Lee for Solicitor General of the United States. I believe he is unqualified for the reasons that follow.

His book, A Lawyer Looks at the Equal Rights Amendment, is a shoddy piece of legal analysis, which largely ignores the excellent legislative history made by the Judiciary Committee and the chief sponsors in both houses. Examples are cited later.

The premise underlying the thesis of his book is an insult to the Supreme Court. His thesis is that the "risks" outweigh the "benefits." However, the risks he cites, with the exception of the drafting of women, assume the Supreme Court will make decisions irresponsibly and without regard to Congressional intent.

Mr. Lee also overlooks the fact that if the Supreme Court were inclined to act irresponsibly in gender discrimination cases, it would be freer to do so under the 14th amendment than under the ERA. The 14th amendment has no legislative history relating to gender discrimination. The Court will have the benefit of a clear comprehensive legislative history to guide it in acting under the ERA.

One blatant example of his lack of regard for the Court and lack of attention to legislative history is his analysis of the effects of the ERA on legal rights of homosexuals. He refers to a student note in the Yale Law Journal written after the ERA had passed the Congress to support the "risk" that the Court will hold unconstitutional State laws prohibiting homosexual marriage. (p.64)

He fails to mention Senator Bayh's clear statement in the debate on March 21, 1972, which reads as follows:

> The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman - or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man. (118 Cong. Rec. S4839)

In addition to citing the student note, Mr. Lee states, "Homosexual conduct laws involve the clearest possible kind of classification based on sex," ignoring completely that sex and sexual preference are separate legal concepts. If Lee's statement were true, Title VII of the Civil Rights Act of 1964 would prohibit discrimination because of sexual preference in employment.

Laws prohibiting discrimination in housing and credit because of sex would also prohibit discrimination because of sexual preference. To my knowledge, no one has made such a claim; certainly no court has reached this conclusion.

Surely, Mr. Lee cannot seriously believe that the Supreme Court would rely on a student note in preference to a statement from the chief sponsor in the debate - not to mention relying on the common sense understanding that discrimination because of sex is different from discrimination because of sexual preference.

Another major criticism of Lee's purported legal analysis of the ERA is the unwarranted emphasis he places on the rejection by the Senate of Senator Ervin's amendments (p.43) He asks: "If those who voted for the Equal Rights Amendment did not intend it to repeal rape laws or require that women be sent into combat, then why did they reject amendments stating that, in those and other instances, the broad language of the amendment does not mean what it says?" The answer to his question is in the debate about the amendments, which makes it clear that all were either unnecessary or undesirable. It is also clear from the debate that the amendments were introduced in an effort to defeat the ERA. All of the proposals for change in the wording of the ERA would have provided less promise of equal legal rights for women than women could hope for under the 14th amendment. The 14th amendment has no qualifications or exceptions.

Another important defect in his analysis is his argument that the language of the ERA is as broad as that of the 14th amendment and would , therefore, lead to bad decisions by the Supreme Court. In support, he summarizes decisions of the Court under the 14th amendment with which he disagrees. (pp. 39 and 88)

As Mr. Lee should know, the intent of Congress with respect to the 14th amendment was not clear, The legislative history of the 14th amendment was in no way comparable to that of the ERA.

Both houses of the Congress passed the same version of the ERA, and there was a remarkable unanimity among the chief proponents, expressed fully in the majority report of the Senate Judiciary Committee. The Judiciary Committee and the chief sponsors were fully aware of the problems caused by deficiencies in the legislative history of the 14th amendment and went to great lengths to establish clearly the intent of the Congress.

Thousands of copies of the majority report were distributed to State legislators and to citizens lobbying in State legislatures considering the amendment. Immediately after passage by the Congress, the Citizens' Advisory Council on the Status of Women (a Presidential advisory body that had endorsed the ERA and published a comprehensive legal memo on it) sent a letter to the leaders in State legislatures, pointing out the importance of the Committee Report in understanding the amendment and advising where it could be secured. The legislators were were also given the dates of the Congressional Records containing the debate and told where they could be ordered.

In contrast, the report of the Joint Committee on Reconstruction, which held heargins on and proposed the 14th amendment, was not published until after both houses had acted on the amendment. The two houses passed differing versions. Furthermore, section 1, which is the most important today, was little discussed in the debate or the report. (See Bickel, Alesander M., "The Original

Understanding of the Segregation Decision," 69 Harvard L.R. 1)

In summary, Mr. Lee's book is a disingenuous attack on the ERA, certainly not the scholarly effort one would expect from a lawyer seeking the post of Solicitor General.

If Mr. Lee is capable of more scholarly legal analysis, he must be so emotionally opposed to equal legal rights for women that he cannot be objective about the ERA.

In other words, whatever the explanation for the shoddy book, Mr. Lee is not qualified for Solicitor General. He is either professionally deficient or temperamentally unfitted.

Sincerely yours,

Catherine East

Catherine East

P.S. As Executive Secretary of the Citizens' Advisory Council on the Status of Women, I worked closely with the staffs of the Judiciary Committees of both houses in setting up hearings on the Equal Rights Amendment and developing the legislative history. The Committees requested such assistance because the Council, a Presidential advisory group, had endorsed the ERA and has published a legal memo proposing a legal theory to undergird the ERA.

association of FLIGHT attendants
1625 MASSACHUSETTS AVENUE, N.W., WASHINGTON, D.C. 20036, 202-328-5400

June 22, 1981

The Honorable Strom Thurmond
Chairman, Senate Committee on
  Judiciary
2226 Dirksen Senate Office Building
Washington, D. C.   20510

Dear Senator Thurmond:

The Association of Flight Attendants, the largest flight attendant union in the United States, represents 23,000 flight attendants on 16 airlines. Approximately eighty-five percent of our members are women. Because of our concern for the needs of working women and our belief that Mr. Rex Lee is not sympathetic to those needs, we oppose his appointment to be Solicitor General of the United States.

AFA has been among the leading organizations litigating to end sex discrimination and to secure equality for women in the workplace. In these endeavors we expect to receive the full support of the Federal government.

The Solicitor General plays an important role in determining the involvement of the Federal government in equal employment opportunity law suits. As the chief lawyer for the United States, he determines whether the government will petition the U. S. Supreme Court for *certiorari*. Also, as the attorney representative of the United States before the high court, he participates as *amicus curiae* in cases of major constitutional importance. Therefore, it is imperative that the person holding this vital office be sensitive to issues of women's rights.

The views expressed by Mr. Lee in his book, *A Lawyer Looks at the Equal Rights Amendment*, indicate that he could not direct an effort by the government to argue vigorously for women's rights before the Supreme Court. Furthermore, we are dismayed that the record of equality of opportunity for women at the Brigham Young University law school under Mr. Lee's tenure as dean is unfavorable compared to other institutions. The percentage of women students and faculty members at the law school is extremely low. Both his published views and his record as dean testify against appointment to this important post.

Therefore, we ask the Committee not to recommend confirmation of Mr. Lee to be Solicitor General.

Sincerely,

Linda A. Puchala

Linda A. Puchala
President

afa

Mercedese M. Miller
President
D.C. State Federation of
Business and Professional Women's Clubs, Inc.

4601 North Park Avenue
Apt. 501
Chevy Chase, Maryland 20015

Work (202) 254-8070
Home (301) 652-6942

June 29, 1981

The Honorable Strom Thurmond, Chairman
United States Senate Judiciary Committee
United States Senate
Washington, D.C. 20010

Dear Senator Thurmond:

On June 27, 1981, the Board of the D.C. State Federation of Business and Professional Women's Clubs, Inc. met in Washington, D.C. and unanimously approved a resolution to join with the American Association of University Women, Equal Rights Advocates, ERAmerica, the National Federation of Business and Professional Women's Clubs, the National Women's Political Caucus, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund in support of the statement of these organizations submitted on June 19, 1981 in opposition to the appointment of Rex Lee as Solicitor General of the United States.

I understand that the record will remain open through June 30 for submission of material regarding this confirmation and would appreciate it if you would include this action of our Board in the record.

Thank you.

Sincerely,

Mercedese M. Miller

Mercedese M. Miller
President

cc: Members of the Senate Judiciary Committee

June 30, 1981

Strom Thurmond, Chair
Senate Judiciary Committee
Washington, D.C. 20510

Dear Senator Thurmond:

Enclosed is a letter to Rex Lee. I would appreciate it if you would include this correspondence in the "record" of testimony regarding his possible appointment as Solicitor General of the United States.

Thank you.

Maida Rust Withers

Maida Withers
2937 N. 26th Street
Arlington, Va. 22207
703-522-7060

June 30, 1981

Rex Lee, Dean
Law School
Brigham Young University
Provo, Utah

Dear Dean Lee:

Last week, following the hearings of the Senate Judiciary Committee regarding your proposed appointment as Solicitor General, I approached you regarding your book, "A Lawyer Looks at E.R.A." If you recall, I inquired as to when you conceived of the idea of writing such a book. You replied that it was near the time of the debate on the extension for the equal rights amendment. I then asked you directly if you had been approached or encouraged by any person or organization to write such a book or if the idea was wholly and totally your own idea. You stated that the idea was definately your own and you had not been influenced by anyone regarding this matter.

Last year, on October 4, 1980, Gordon Hinckley, an Apostle for the Church of Jesus Christ of Latter-day Saints, met in Salt Lake City with three Mormon women, Cheryl Dalton, Marty LaBrosse and Sarah Campbell, to discuss their concerns about the anti-ERA campaign being waged by the Mormon Church. As you know, Elder Hinckley heads the Special Affairs Committee that directs the anti-ERA campaign for the Mormon Church. During the meeting, Elder Hinckley stated that you (Dean of the B.Y.U. Law School) had been asked by the Church to produce a document presenting the legal case against the equal rights amendment.

As an employee of the Church and in the position of Dean of the law school, at the time it seemed logical to me that you would be selected to be the spokesperson for the Church in making a legal defense for their already hard-line position. The fact that B.Y.U. press also published the book raises questions as to the relationship of the Church to your publication. If the Church had no involvement in the development of the book, how was it that an Apostle, who was orchestrating and directing the anti-ERA campaign for the Church, had foreknowledge of the book and could speak of the general contents of the book prior to publication?

As a member of the Church, I understand the delicate nature of your position as an employee in the corporate structure and your duty to support the policies of the Church. The discrepancies in this seemingly minor matter are simply bothersome to me and may indicate a conflict of loyalty that would be troublesome in the position of Solicitor General.

Sincerely,

Maida R Withers

Maida R. Withers

cc: Senator Strom Thurmond
Senator Edward Kennedy

June 30, 1981
Arlington, Virginia

Statement by Cheryl L. Dalton
7373 Fallenleaf Lane #25
Cupertino, California 95014

On October 4, 1980 at approximately 5:30 p.m., Marty LaBrosse, Sarah Campbell and I met with Gordon Hinckley, a member of the Council of the Twelve of The Church of Jesus Christ of Latter-day Saints in his office in Salt Lake City, Utah.

We discussed the official stand of the Church against the Equal Rights Amendment and conveyed our dismay at the arguments presented in the booklet "The Church and the Proposed Equal Rights Amendment: A Moral Issue." The booklet was bound into the March 1980 issues of The Ensign (the official Church publication for adults) and The New Era (the official Church publication for teens).

At that time we presented him with a written rebuttal to the Church's booklet. The rebuttal refutes each of the arguments contained in the Church's publication on the ERA.

Mr. Hinckley then told us of the forthcoming book on the ERA by Rex Lee, "A Lawyer Looks at the Equal Rights Amendment." The Congress of the United States has gone to great lengths to establish clearly the intent of Congress as to the meaning of the proposed Equal Rights Amendment. Mr. Lee's book gives little weight to the extensive legislative history established by that body.

It was made clear to us that Hinckley not only had prior knowledge of the manuscript, but that Mr. Lee was encouraged through Church lines to write the book critical of the Equal Rights Amendment. Mr. Hinckley spoke of the necessity of getting the book to press quickly. Mr. Hinckley is not only a high Mormon Church official, but heads the Special Affairs Committee which has coordinated the overt and covert anti-ERA activities of the Church. Mr. Lee has now been appointed Solicitor General of the United States.

Cheryl L Dalton

June 20, 1981

The Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
Russell Office Building
Washington, DC 20510

Dear Senator Thurmond:

I was present, along with 2 other members of the Harrisburg Chapter of NOW, at the Judiciary Committee hearing on Friday, June 1981, concerning the nomination of Dean Rex E. Lee as Solicitor General of the United States.

I ask that the following testimony, along with the photocopy of the article "The Revolt of Texas Women," be entered into the record since it relates to the confirmation of Dean Lee:

> I was widowed at the age of 32 while a resident of Pennsylvania. At that time I was employed by a law office, heading their real estate and title insurance office, and thus had a grasp of what my rights, as a woman, were under Pennsylvania law. After the death of my husband and other family members, I was offered and accepted a job in Harrisburg, Pa. It became apparent to me after a few months that I would be very unhappy in Harrisburg, and I wanted to return to my home town, San Antonio, Texas. About that time I happened across an article in The Saturday Evening Post (copy enclosed) setting forth what legal handicaps women were under because of lack of equal rights under the Constitution, enabling states to make laws discriminating against women in various areas.
>
> On the basis of this article I wrote to an attorney in San Antonio and asked whether I could retain control of my SEPARATE property if I should return to Texas and remarry. His reply was, in a word, NO!
>
> If I invested my liquid assets in an interest bearing account, my husband could take half the income; if I had rental property, such as I have now in Pennsylvania, my husband could take half the income; I could not go into business, which I considered doing, without my husband's permission. If I invested my funds in stocks, I could not sell them without my husband's permission. The attorney said that "Texas law presumes that a husband has the duty to see that a woman does not make a mistake in selling her stocks." I had just completed serving 4 1/2 years on a school board (3 years on the Budget Committee) with an annual budget, translated into today's dollar value of about $6 million,

been involved in the building of 2 schools with the attendant bond issues - - but Texas law would presume I didn't have the intelligence to handle my business affairs.

I could only conclude that I must remain in Pennsylvania, where I could control my separate property in the event I remarried, or resolve never to remarry if I returned to Texas. I was rather young for the latter alternative.

Consequently, I have had to live for 21 years, and must continue to live for the rest of my life, where I do not wish to live because I DO NOT, AS A WOMAN, HAVE EQUAL RIGHTS UNDER THE U. S. CONSTITUTION. It is true that Texas now has equal rights for women as part of its State Constitution, and I assuredly will not remarry, but it is financially impossible for me to return to my home town as a beginner in the job market.

For half a century I have experienced and observed other women experiencing discrimination in many areas. Enough!

Mr. Lee says that the ERA is not in the best interest of the United States. Is it a coincidence that the position of the Mormon Church is the same? (Presumably the government of the Union of South Africa feels that the elimination of apartheid is not in the "best interest" of the nation. Best interest for whom -- the racist white minority?)

What would have been Dean Lee's position in Civil Rights cases concerning Blacks before it was suddenly "revealed" to the Mormon hierarchy in 1978 that their opinion of Blacks had been wrong for the last 150 years?

I urge the Judiciary Committee not to report favorably on Dean Lee's nomination* since it would seem impossible for him to separate his personal religious beliefs from the best interests of over half the population of the United States.

Sincerely,

Odessa B. Lang

Odessa B. Lang
103 Penrose Street
Harrisburg, PA 17109

Enclosures: 2

cc - Members of the Judiciary Committee

* and Confirmation

[From the Saturday Evening Post, January 1961]

THE REVOLT OF TEXAS WOMEN

In the Lone Star State the law has long classified women with children and idiots. But now the ladies are rebelling. A Post editor reports.

(By Peter Wyden)

It's an uprising! said the red headline over a front-page editorial in the Austin, Texas, *Statesman* several months ago. "Texas women have gone to war," agreed the Beaumont *Enterprise*. "The women have some pretty good arguments against the overlording male," editorialized the Houston *Chronicle*; "don't they always?" The weekly *Pioneer* in Fort Stockton (pop. 6123) inquired, Are Women People? While not committing itself to an unequivocal reply, it suggested that Texas women were getting a run-around from the state legislature and that the legislators should know better.

"No mere man has ever won an argument with an aroused female," the *Pioneer* concluded. "Capitulation appears the only wise course."

Behind these less than straight-faced comments smolders a dead-serious tug of war. Another round is about to commence in Austin, the state capital, and capitulation is nowhere in sight. In one corner stands a determined and well-organized band of Texas ladies. In the other, slightly camouflaged by verbal smoke screens lurk some of the most powerful politicians in Texas. At stake are forty-four laws which seems to have been lifted from a misogynist's happy dream.

For instance:

A husband who surprises his wife with her paramour and kills him goes free without even standing trial, but a wife who eliminates her husband's mistress under similar circumstances is charged with murder. A wealthy woman wants to buy some bonds with her own money, but can't place an order with her broker without her husband's written consent. A lady shopkeeper wants to purchase merchandise from a new supplier, but can't because Dun & Bradstreet won't list her perfectly adequate credit rating. A wife is injured in an accident and wants to sue for damages, but can't file suit because her husband is not available to cosign her complaint.

All these contingencies can and do occur in Texas, which has the distinction of retaining what experts describe as a record crop of old laws discriminating against married women. The 8400 members of the Texas Federation of Business and Professional Women's Clubs want these laws wiped out, and the controversy is turning warmer.

"It's a filibuster," says Dallas District Judge Sarah T. Hughes.

"Some of these senators were rude to me," says Mrs. Hermine Tobolowsky, former president of the Texas federation and crusader-in-chief for the nearly 5,000,000 women of Texas. "So I said to myself, 'O.K., boys, you want war? You'll have it'!"

The leader of the male opposition, state Sen. Wardlow Lane, winks and says, "These do-good women come to Austin in droves all dressed up and preach that I hate women. I deny the charge!"

While Mrs. Tobolowsky and her confederates are generating political heat for an amendment to the Texas constitution which would guarantee women completely equal treatment under the law, the National Federation of B. & P. W. and other women's groups are lobbying in Congress for a similar addition to the United States Constitution. For, contrary to popular notion, the campaign for women's rights did not cease with the riots and jailings that preceded the adoption in 1920 of the Nineteenth Amendment guaranteeing universal suffrage.

Special treatment for females varies widely from state to state, cutting across real estate, commercial, divorce and criminal laws. The Women's Bureau of the United States Labor Department, in an attempt to keep up with changes in such statutes, produced a stack of pamphlets nearly two inches high. The sum of these laws is impenetrable confusion.

Three states—Alabama, Mississippi and South Carolina—still bar women from juries and other states require special qualifications of lady jurors. In five states—California, Florida, Nevada, Pennsylvania and Texas—married women must get court permission to go into business for themselves. Quite a few states limit the rights of women to make contracts, and only twenty have laws guaranteeing women equal pay with men in comparable jobs. Employers working on Government contracts may not discriminate against workers because of race or country of origin, but there is no Federal rule against discrimination because of sex.

Still, the ladies' case is by no means as clear-cut as it appears at first glance. Some of the "discrimination" against them is surprisingly defensible. There are, for example, laws protecting women from excessive working hours and other hazards.

An equal-rights amendment would wipe these out too. The B. &. P. W. campaigners feel that women need no special treatment whatsoever. But as we shall see, there are influential groups that disagree.

The most popular defense of anti-women legislation is that it "protects" the ladies. In certain Texas circles, though "protection" is no longer a polite word. Mrs. Tobolowsky, a deceptively mild-appearing, thirty-nine-year old Dallas attorney, recalls that the 1957 Texas legislature made "all able-bodied citizens, male and female" subject to military duty in an emergency. Then she says, "I question the sincerity of a man who wants to 'protect' women from the ordeal of managing their own property when they're willing to draft them for the militia!"

Before a legislative committee she put it even more bluntly. "Gangsters use that word 'protect,'" she said. "It's being applied to us in the same form. The laws were designed to protect women, but under today's standards they do not. Women are in ample position to protect themselves."

Mrs. Tobolowsky certainly is. Her family has run dry-goods stores in San Antonio since the '70's, and when Hermine was growing up, the family tradition was that everybody worked. Her mother kept the books. Hermine sold and cashiered after school. A bright girl with an obvious gift for argument and persuasion, she drifted naturally into the University of Texas Law School and was graduated with honors in 1943.

Early in her legal studies she learned how Texas law descended from the British Common Law and ancient Spanish rules. Both codes treated women as chattels. As Blackstone wrote, "Husband and wife were one, and that one was the husband." Hermine also was aware of the frontier saying that Texas was fine for men and horses but hell on dogs and women. But like most Texans she didn't realize how much modern law still discriminates against her sex. Then, in class one day, the instructor discussed a case history that shocked her so thoroughly that her life has not been the same since.

It was the case of a Houston wife whose husband deserted her and left her with five children. With a small inheritance from her family she wanted to start a business, but nobody would lease her a store. Her attorney suggested that she petition the local court to remove her "disabilities of coverture" and declare her a feme sole (woman alone). The petition was denied. Unwilling to get a divorce because of religious reasons, she moved to a town where nobody knew her, passed herself off as a widow, opened a store and became prosperous. Twenty-one years later her husband located her, discovered that she was well-to-do and took over management of her property and money. Within months the wife discovered that the husband had signed over substantial chunks of her wealth to a girl friend. The wife's attorney advised her to sue the girl friend for half of the gifts. She sued but lost.

This sequence happens to encapsule several remarkable laws—all still in force. The Houston lady couldn't lease a store because all contracts of a Texas wife are voidable unless cosigned by the husband. Her petition to go into business under the so-called "sole-trader" law was denied because the court was not allowed to grant it without her husband's approval. Her attempts to recoup from the husband's girl friend failed because Texas husbands hold exclusive rights to manage all property of husband and wife and—short of hard-to-prove fraud—can do anything they want with it.

Few people are ensnared by this much red tape in one lifetime. But each of these statutes can produce a rich lode of trouble. In a southwest Texas city a woman who had long owned a successful dress shop discovered that her marriage to a carpenter altered her fortunes unexpectedly. It wasn't just that the husband considered himself a fashion authority and told his wife what dresses to buy. He relished his managerial rights and would not O.K. his wife's request to have herself declared a "sole trader." And since Dun & Bradstreet refuses to list the credit rating of a business involving a part owner whose legal liability is doubtful, the lady is having an increasingly difficult time getting merchandise.

Business women who get along swimmingly with their husbands resent being forced to go to court and pay legal fees to obtain an economic "divorce." Some, like Mrs. Ada Nelson and several of her fellow shopkeepers in Bridge City, are so piqued that they struggle along without court assistance. "We're not going to spend that money," says Mrs. Nelson, who runs Ada's Shoe Shop. "It's unfair. Some companies look at you and say, "You'll have to have your husband sign; you know a woman isn't responsible in Texas!' It's insultin'!"

Women are apt to discuss the removal of their legal disabilities in surgical terms. ("I had mine in Forty-six.") Frequently they discover, only after this legal operation, that it is no cure-all. Feme-sole status is granted only for mercantile and trading purposes. If a wife wants to sell, say a car or a bond or a house, she must have her husband's power of attorney, and the document must spell out precisely what rights he is surrendering.

Mrs. Tobolowsky learned of these and other ramifications of the antifemale laws back at law school, but even after she joined a San Antonio law firm there was little she could do about them. Since 1921 Texas women's groups had concentrated on campaigns for the right of women to sit on juries. When Mrs. Tobolowsky joined this movement in the '40's, its cause was still controversial. Should women be exposed to "messy" court cases? Could they render dispassionate judgment on complicated litigation? Many Texans evidently didn't think so, for the question was put to a vote as a constitutional amendment in 1949 and defeated.

Significantly, a lot of opposition came from women. They didn't want to be separated from their families and "locked up overnight with a bunch of men." But in 1953 the proposition was approved.

By this time Hermine had married Hyman Tobolowsky, an executive of a Dallas clothing store, who was and is in sympathy with her feminist outlook. She was also rising in the Texas Federation of B. & P. W. By 1957 she was president and ready to tackle the legislature on behalf of womanhood.

She caused two bills to be introduced. One would have given women control over separate property owned by them at marriage or acquired by inheritance. The other would have eliminated "separate acknowledgement" by women in the sale of homes. During the closing of such sales before a notary public, according to an 1841 Texas law, the husband must be sent out of the room and the sale explained separately to his wife. In the days when husbands gambled away homesteads, and many wives couldn't read, this insured that the little woman understood the transaction and wasn't selling her fireside under husbandly duress.

Today most husbands know their place well enough to comment wryly that their spouses should be sent out of the room instead. But nobody likes the law's implications.

"I think it's the silliest law we have," says the owner of a large title company. "It makes the women feel like morons." Furthermore, unless carefully observed in the presence of witnesses, it is a gateway to fraud. In East Texas, after oil was discovered in 1901, numerous land deals were invalidated because they were not "separately acknowledged" by women. When oil was found under land which these ladies and their husbands had sold, they simply claimed that the wives hadn't understood what they were doing and got their property back.

In lobbying for their bills, the business and professional women encountered good-humored acceptance as well as undisguised antipathy. When Mrs. Ruth Fox, a puckish but grandmotherly looking social worker who is the current president of the federation, dropped in on one legislator she announced, "Senator, I've come to lobby you!" Her victim chuckled and promised his support.

But Mrs. Tobolowsky's stern and well documented approach ruffled legislative feathers. "What trouble are you having with your husband?" inquired one senator at a hearing. In the end the separate-property bill was emasculated and the separate-acknowledgement bill died.

To understand why, it is necessary to know something about the Texas legislature, especially the powerful thirty/one-man senate. It is a relatively informal body not unacquainted with scandal and maneuvering by interests juggling huge stakes. Its ringmaster is Ben Ramsey, who was recently elected to a recordbreaking sixth term as lieutenant governor and has built his office into one of extraordinary influence.

When the usually monosyllabic Ramsey was once asked when the senate would come to order he said, "The senate of the state of Texas never comes to order. It just meets." Its business, moreover, is conducted under "Ramsey's Rules of Order." Few have been heard to question Ramsey's fairness. But few deny they he holds strong opinions and manages to make them known. When a senator once said he wouldn't yield the floor because he was afraid he'd lose it, Ramsey intoned, "The senator refuses to yield because of fright." On other occasions he has stifled action on bills by consistently failing to see senators who were trying to get the floor.

"Sometimes he gets nearsighted," says Sen. Dorsey Hardeman, grinning.

Mrs. Tobolowsky and her crew are convinced that Ramsey killed women's-rights legislation in 1957 and again in 1959. Ramsey looks hurt at the charge. "I never did get a chance to," he drawls.

In fact, the active opposition was captained by Ramsey's friend, Sen. Wardlow Lane, an attorney in Center (pop. 4487), just twenty minutes up the road from San Augustine (pop. 2581), where Ramsey practices law. Lane's most dedicated helper has been Senator Hardeman. It happens that these two witty and efficient operators are veteran chairmen of the two most potent senate committees. Together, Ramsey, Lane and Hardeman constitute the senate's core, its "in-group."

Routed in 1957, Mrs. Tobolowsky and her strategists decided that attempts to change forty-four laws one by one were hopeless. They decided instead to champion a blanket equal-rights amendment; it would require approval by two thirds of both houses of the legislature and then by a majority of the electorate. The ladies also decided to wage a livelier campaign.

While B. & P. W. leaders continued to donate their time and most travel expenses, a $17,000 war chest was raised. Each club member was asked for three dollars, but "the girls" of the Lubbock club, for example, were so enthusiastic that they contributed nine dollars each. Instead of buying corsages for speakers, ladies fashioned "moneysages" of dollar bills which wound up in the treasury. Mrs. Fox journeyed from meeting to meeting displaying a ragged doll which she called "Poor Pitiful Mrs. Pearl Texas." She collected dollars in her "finance hat," a floppy ninety-five-dollar French creation.

"Too long we have suffered behind the Iron Curtain of legal inequalities," she cried.

Most of the contributions went into printing more than 300,000 brochures explaining the objectionable laws. Nobody really knew much about many of them, and it took Mrs. Tobolowsky weeks at her law books to locate and outline them. It turned out that a man asking for a divorce because of adultery need prove only one unfaithful act by his wife; a woman wanting a divorce on the same grounds has to prove that her husband has left home and is living with another woman. Then there were laws classifying women together with minors and idiots; statutes prohibiting women from filing law suits without the "joinder" of their husbands; or making notes without their husband's signatures; or signing bail bonds, even if they were trying to get their own husbands out of jail.

As Mrs. Tobolowsky traveled and spoke—she made eighty-one talks in nine months—more and more women rose in her audiences and related their hardships. She decided to write three skits about such cases. They were presented at club meetings throughout Texas. Invitations to the most successful playlet, The Court of Public Opinion, were by "subpoena" to be presented at the trial of the case, "Texas Women vs. Discriminatory Laws." The skit featured a judge who was compelled to hand down unfair verdicts because her hands were tied by Texas law. The audience was the jury. More than 1000 delegates who witnessed this dramatization at a B. & P. W. state convention found themselves transported into a state of notable enthusiasm.

"Do you find the laws of Texas fair to women?" they were asked.

"No!" they shouted.

"Should the laws of Texas be changed?"

"Yes!"

"Are you willing to work to change them?"

"Yes!"

By now, several thousand women have taken the "twenty-four-hour pledge" promising to campaign a total of at least twenty-four hours in the cause.

At the 1959 legislative session, an equal-rights bill passed the house unanimously, perhaps in part because "the girls" in Lubbock had lobbied persuasively with their fellow townsman. Waggoner Carr, the speaker. In the senate, the bill was introduced under cosponsorship of eleven members. Mrs. Tobolowsky was asked by her supporters not to speak at the hearing of the Committee on Constitutional Amendments because it was feared she wouldn't be "sweet" enough. Another Dallas attorney, Mrs. Betty Roberts, became the spokesman, but she didn't have much chance to show her sweet side, either.

Senator Lane wanted to know whether the amendment wasn't a violation of the Bible, which calls the husband (Ephesians 5:23) "the head of the wife."

"It's not like in the olden times when the Bible was written," said Mrs. Roberts. "You'd be surprised how many women are supporting men."

Doesn't existing law guarantee an ugly and therefore unmarriageable girl an unchallengeable right to keep her family's farm as a homestead? asked Senator Lane.

"The cold-cream ads say there are no ugly women," Mrs. Roberts shot back, "only some who don't know how to fix themselves up."

Senator Hardeman predicted it would take forty to fifty years to uncover how the amendment would conflict with existing laws, especially those concerning property rights. Wouldn't it also permit his two sons to go to Texas Woman's University?

"I don't care where they go," countered the embattled Mrs. Roberts.

It was suggested to buck the amendment to the state attorney general, Will Wilson, for study and—hopefully—pigeonholing. The vote on this idea was six to six. Then Committee chairman Bill Wood voted for it and broke the tie. But the attorney general did not take long to send the amendment back with little comment. To advise the senators, he said, would be an invasion of their legislative prerogatives.

For weeks after that nothing happened. The women kept pressuring for another hearing and vote. Somehow the committee never mustered a quorum until near the end of the legislative session. Mrs. Fox and still another Dallas attorney, Mrs. Edith DeBusk, presented themselves in Austin on the appointed day. They were asked to wait. The late afternoon found them sitting in the senate gallery. On the floor below there were signs of obvious unrest. Members of the Committee on Constitutional Amendments kept conferring and glancing uncomfortably toward the gallery. Finally the ladies were summoned by one of their supporters and told that they could best serve their cause by going away.

They did, and no hearing was held until the next morning. For this occasion, to the consternation of the senators, Mrs. Tobolowsky appeared, grimfaced. Finally a vote was taken. It favored the amendment six to three. Unhappily, the session's end was now so close that there just never seemed to be time to place the proposal on the senate calendar for a final vote. And so it died.

Offhand, this sounds like an invitation to political suicide for Senator Lane and his allies.

"I guess they'll get me sometime," says Lane, a short, chunky former district attorney, as he contemplates the ire of his female adversaries. "They keep askin' me, 'What's happened in your life to make you hate women?' " But he relates this with a grin, for Lane, a happily married man, neither dislikes women nor anticipates political defeat. There are few business or professional women in such rural districts as his. When pressed on the point, Lane admits that his stand is even netting him some admiration.

"People say, 'There must be somethin' to that feller if he's buckin' them women.' "

Furthermore, Lane and his friends claim that antifemale sentiment among their fellow legislators is far greater than is apparent. "They tell me, 'You're right as a fox, but I'm not going to vote against all these women.' " Lane says. Senator Hardeman remarks of his supposedly less-courageous colleagues, "They've been brainwashed or promised future political support."

But all this is mostly shadowboxing. The facts are that (1) many Texans, including women, still don't know much about the discriminatory laws and don't seem overly concerned about them; (2) there is serious doubt that an equal-rights amendment would pass if, put to a popular vote; and (3) the merits of the amendment, as proposed by the women, are not as unequivocal as advertised by the B. & P. W.

To begin with Texas remains predominantly a state of lonely spaces and small towns where women's place is at home, not out competing with the menfolk. It's a big state; amateur organizers find their work cumbersome, and the B. & P. W. clubs have no chapters in 117 out of 254 counties. It's also a conservative state, where the modernization of any law is a wearisome process. Moreover, relatively few lady voters suffer personally under the the antiwomen legislation—unless they're in business or having disagreements with their husbands.

Consequently, an experienced political hand like Lieutenant Governor Ramsey is profoundly untroubled by Mrs. Tobolowsky and the campaigners for her amendment. "They're not speaking for the women of Texas," he says. "I think if they submit it to a vote, the people'll take care of it and kill it dead."

But attitudes in Texas, as elsewhere, are changing and Ramsey may be underestimating the appeal of the equal-rights campaign. Last spring it became a statewide political issue for the first time. Donald H. Yarborough, a thirty-four-year-old Houston attorney with no political experience, challenged Ramsey in the all-important Democratic primary. He dubbed him. "King Ramesis," an "absolute dictator," and charged him loudly with killing equal rights for the ladies. Yarborough got 631,000 votes. This was some 200,000 fewer than Ramsey got. But it was also the most respectable showing anyone has made against the lieutenant governor for years.

Some of the projected effects of the B. & P.W. proposal on the status of women are hardly grave. Senator Lane wonders whether newlyweds would have to flip a coin to determine whether their family name was to be the bride's or the groom's. But both he and Ramsey worry seriously about the possible impact on the community-property laws and the protection which these statutes now afford women under some circumstances.

Potentially, the most serious result of the proposed amendment is on a group of laws which now protects women workers. Since unions are not too influential in Texas, there is little talk about this side effect. It is, however, the key objection which keeps scuttling the perennial national equal-women's-rights proposal everytime it comes up in the United States Congress. First, there is usually a jovial exchange, such as one last July between Senators Sam J. Ervin of North Carolina and Olin D. Johnston of South Carolina.

ERVIN. I think there is a difference between men and women, and I thank God for the difference (laughter). I do not think we can wipe it out by legislation.

JOHNSTON. I think many people who are advocating equal rights for women do not realize they are seeking to take away a lot of rights which the women now have and the men do not have.

ERVIN. It would bring the women down to our level.

Then invariably, Sen. Carl Hayden of Arizona proposes an addition to the amendment which makes it acceptable to its most influential opponent. This is the AFL-CIO, whose spokesmen point out that women—for an example—become eligible for social-security benefits at sixty-two; men only at sixty-five. The Hayden amendment specifies that new equal-rights legislation should "not be construed to impair any rights, benefits or exemptions" conferred on women by law in the past or in the future.

An equal-rights law containing such a clause has been in effect in Wisconsin since 1921 without creating controversy. But the Hayden amendment is unacceptable to the all-or-nothing equal-rights lobbyists, and so the whole business keeps winding up back in committee to die.

At the present congressional session its fate is likely to be the same, but in Texas it may fare better. Mrs. Tobolowsky has charted a do-or-die strategy for the current legislative session, beginning this week, and more women are falling in behind her.

"I put my bet on her," says Mrs. Stathakos Condos, a district vice president of the Texas Federation of Women's Clubs. "The day for diplomacy is over for fighting this thing!"

CONFIRMATION HEARING ON WILLIAM BRADFORD REYNOLDS, TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

WEDNESDAY, JUNE 24, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Mathias and Specter.

Staff present: Vinton D. Lide, chief counsel; Duke Short, chief investigator; Allan Spence, investigator; and Pamela Swanner, clerk.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The Committee on the Judiciary will come to order.

I am very pleased today to have before the committee Mr. William Bradford Reynolds, nominee for Assistant Attorney General, Civil Rights Division, Department of Justice.

The Civil Rights Division, headed by an Assistant Attorney General, was established in 1957 in response to the need to secure effective Federal enforcement of civil rights.

This Division is responsible for enforcing Federal civil rights laws which prohibit discrimination on the basis of race, national origin, religion, sex, age, and physical disability.

The major areas of concern are voting, education, employment, housing, credit, the use of public facilities, public accommodations, and in the administration of federally assisted programs.

With respect to employment, housing, and education, sex discrimination is also prohibited.

The congressional statutes enforced are the Civil Rights Acts of 1957, 1960, 1964, 1968, the Voting Rights Act of 1965 and their amendments, and the Equal Credit Opportunity Act, as amended, in 1976.

Mr. Reynolds, as you can see, the burdens upon you as head of the Civil Rights Division will be heavy. It will be incumbent upon you to be fair and just to all citizens.

I am confident that if you are confirmed, you will act in an impartial manner and reflect great credit, not only on yourself but on the Government which you are to serve.

Again, I am very pleased to have you with us here today.

At this point, we will insert your résumé into the record, Mr. Reynolds.

[Material follows:]

WILLIAM BRADFORD REYNOLDS

Date of birth: June 21, 1942, Bridgeport, Conn.

Legal residence: Maryland.

Marital status: Married; Lynn Morgan Reynolds, four children.

Education: 1960-64; Yale University, B.A. degree. 1964-67 Vanderbilt University, School of Law, LL.B. (J.D.) degree.

Bar: 1968, New York Bar; 1973, D.C. Bar.

Experience: 1967-70, Sullivan & Cromwell, New York, N.Y., Associate; 1970-73 Department of Justice, Washington, D.C., Assistant to Solicitor General; 1973-present, Shaw, Pittman, Potts & Trowbridge, Washington, D.C., Litigation Partner.

Office: 1800 M Street, N.W., Washington, D.C. 20036. 202 822-1072.

Home: 9201 Belmart Road, Potomac, Maryland 20854. 201 299-4984.

The **CHAIRMAN**. Before we go into your testimony, Mr. Reynolds, it is customary to swear in the witness. I would ask you to stand and raise your right hand.

Do you solemnly swear that the testimony you shall give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **REYNOLDS**. I do.

The **CHAIRMAN**. Senator Mathias is present, I see. I will now call upon him.

Senator Mathias is the ranking majority member of the Judiciary Committee and the Chairman of the Criminal Law Subcommittee.

STATEMENT OF CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator **MATHIAS**. Thank you very much, Mr. Chairman.

It is my privilege today to present to the committee a distinguished Maryland lawyer. It is also my pleasure to present his family to the committee.

Here today are Mrs. Reynolds and their daughters.

The **CHAIRMAN**. Mrs. Reynolds and the family will please stand up, if you will.

Senator **MATHIAS**. Here are their daughters Melissa, Kristina, and Wendy and their son, Brad Reynolds. Here also are Mr. Reynolds' parents, Mr. and Mrs. Reynolds.

I think it is a signal mark of family unanimity when we have the whole family here, and I thought the committee would want to take note of it.

The **CHAIRMAN**. We thank you very much. We are delighted to have all of you here.

Senator **MATHIAS**. Mr. Chairman, he is, as you have noted, the nominee of President Reagan to head the Civil Rights Division within the Department of Justice.

I must say to you that there are very few candidates who come before this committee who appear with a better—or, for that matter, even an equal—academic professional record.

He is a graduate of Phillips Academy in Andover. He is a graduate of Yale University. By some standards, he is a very recent graduate of Yale University. He received his law degree from the School of Law at Vanderbilt University.

I might note, Mr. Chairman, that at Vanderbilt he graduated second in his class and was also the editor-in-chief of the Vanderbilt Law Review, which is a notable achievement.

He then went on to the firm of Sullivan & Cromwell in New York, which is not noted for taking anything but the best—the cream of the crop—from the law schools of the country. He spent 3 years as an associate at Sullivan & Cromwell.

Then he came to the experience which I think will serve him best in the role that he is now nominated to assume. He became an assistant to the Solicitor of the United States who at that time was Dean Griswold.

Dean Griswold is well known to all of us. He has often been before this committee. In fact, the fact that he chose Mr. Reynolds says a great deal.

While in the Solicitor's Office, Mr. Reynolds wrote approximately 40 briefs on cases then pending in the Supreme Court. Eleven of these briefs he actually argued in the Supreme Court, so there is little question that can be raised about his capacity as a litigator.

Since June of 1973, he has been associated with the firm of Shaw, Pittman, Potts, & Trowbridge here in Washington. He, again, has had a great deal of experience, both in the Federal and State courts.

We are pleased that he is a Maryland lawyer and that I have the opportunity to present him to this committee.

The CHAIRMAN. Thank you very much, Senator; we are glad to have you with us. Feel free to stay. However, if you need to leave, we will understand.

Senator MATHIAS. Mr. Chairman, I suspect you and I are both going to have to leave.

The CHAIRMAN. That is right. The bells have rung for a vote. We will both have to leave in just a few minutes.

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, OF MARYLAND, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

The CHAIRMAN. Mr. Reynolds, the State of North Carolina recently reached a settlement with the U.S. Department of Education concerning goals for the institutions of higher learning in that State, which receives Federal aid. What role, if any, would you envision for the Civil Rights Division in effecting similar settlements in other States; for example, in Louisiana?

Mr. REYNOLDS. Mr. Chairman, I am just generally familiar with that settlement which was recently reached.

I believe that essential principles that underlie that settlement are that students in the educational institutions in that State will be permitted to attend without any restraint or restriction on any basis whatsoever any of the higher education institutions that are in that State.

The settlement generally is concerned primarily with improving and upgrading the educational environment of all the students at higher educational institutions in the State.

Those are two fundamental principles with which I agree and agree with completely in the context of higher education desegregation plans.

I certainly would, in terms of cases in the Department that are of a similar nature, adhere to those principles in furthering some sort of resolution in those cases.

The **Chairman**. Mr. Reynolds, if Congress were to enact legislation to transport the functions of the Civil Rights Commission to the Civil Rights Division, would the Civil Rights Division in your judgment be capable of assuming those functions and carrying them out effectively? Do you believe that a savings in tax dollars could be achieved?

Mr. **Reynolds**. I guess the elimination of the Civil Rights Commission would have some effect in terms of saving tax dollars somewhere along the line.

I am not sure that it would be a comfortable or an easy marriage to fold the investigatory and study functions of that Commission into the essentially litigating functions of the Civil Rights Division. That suggests to me that there may be some management and resource difficulties which I think would have to be studied before that kind of a move was taken.

FOUR MAJOR FORCED BUSING LAWSUITS

The **Chairman**. After the November 5 elections, but before the inauguration of President Reagan, the Civil Rights Division initiated four major forced busing lawsuits. What disposition do you expect in each of those cases, or have you had the opportunity to study those cases yet?

Mr. **Reynolds**. Mr. Chairman, I have not yet studied those cases. I do know that those cases are in the Department right now and are before the Civil Rights Division. I believe that the Attorney General on prior occasions has indicated that they would receive careful review by the Department.

To the extent that this administration determines that those cases do not have substantial merit to be continued, the Department would take appropriate steps to see that they were terminated.

To the extent that those cases might be meritorious, then the Department would pursue them.

I would say to you that if confirmed, one of the very first assignments that I will undertake is to personally review those cases with the Attorney General's remarks in mind.

The **Chairman**. If you find that these cases do not have sufficient merit, would there be any hesitation on your part in discontinuing them?

Mr. **Reynolds**. No, Mr. Chairman. I do not believe that the Department should continue to pursue cases which do not have any merit.

The **Chairman**. In your view, does Congress, under the Constitution, have the power to control remedies that are available to the inferior Federal courts which Congress created pursuant to article III of the Constitution?

Mr. **Reynolds**. I believe that is a very difficult question to answer, Mr. Chairman.

In terms of Congress ability to limit the jurisdiction of inferior Federal courts, there certainly is some basis, on the strength of the

Sheldon v. *Sills* Supreme Court decision of many years ago, to argue that it has some ability in that area.

On the other hand, I would also think that there are limits that perhaps should be imposed on Congress power in that area—certainly flowing from the *United States* v. *Kline*, which was a decision that did address that issue.

I guess that I do not know in my own mind exactly how I will come out on that. I think there is some ability to argue that there is authority in Congress with respect to the lower Federal courts, but it is not authority that is absolute. There are some limitations which probably do exist.

The CHAIRMAN. We will take a 5-minute recess now to vote.

[Recess taken.]

The CHAIRMAN. Senator Specter, I may have to leave before the hearing is over. I wish you would take over if I do.

Senator SPECTER. I would be glad to, Mr. Chairman.

CONSTITUTIONAL ISSUE

The CHAIRMAN. I want to hear as much as I can of what he has to say though before I go.

Mr. Reynolds, we have a number of bills before the committee and there has been legislation on the floor this past week that would take the Department of Justice out of the business of bringing or maintaining busing suits. Do you have a position on the constitutionality of such legislation?

Mr. REYNOLDS. Senator, I think there is pending at the present time in the District of Columbia Court of Appeals a case where there was a question raised as to whether constitutionally, under the existing Eagleton-Biden amendment that relates to the Department of Education, Congress could remove from the Department of Justice its authority to proceed in school segregation cases.

I think that, depending on the nature of the legislation, that certainly would be an issue that would be revisited in that pending case, I am sure.

I am not altogether sure how that issue would be resolved, but I think certainly legislation could raise a constitutional issue in that regard.

The CHAIRMAN. I do not know whether you have had a chance to study the amendment by Senator Helms and another by Senator Johnston of Louisiana. If you have had such a chance, do you believe the antiforced busing amendments by them to the Department of Justice authorization bill are constitutional?

Mr. REYNOLDS. I have reviewed legislation that has been proposed by Senator Helms and Senator Johnston, although I am not sure that I have the latest version. I believe there have been some revisions in that legislation.

I am fully sympathetic with the sentiment of Congress regarding the antibusing legislation. I think that this administration and the Attorney General have also said that they are fully sympathetic with that sentiment.

It is not clear to me what is the best way for Congress to proceed, in terms of drafting legislation to address that issue.

My own feeling is that it would be well, if I am still correct on what the Johnston bill would do, to hold hearings and formulate findings based on those hearings that would support the kind of legislation in the Johnston bill.

I think that Congress, if it is going to take a step in this area, should do it on that kind of informed basis.

The CHAIRMAN. Senator Specter, if you could go and vote and then immediately come back and take over, I would appreciate it.

Senator SPECTER. I would be glad to do that, Mr. Chairman.

The CHAIRMAN. I will go as far as I can.

Senator SPECTER. That is where I came in you know, sir.

The CHAIRMAN. Thank you.

Mr. Reynolds, what is your opinion of the scope of congressional power granted by the Constitution in the exceptions clause to article III, which read as follows:

> The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions and under such Regulations as the Congress shall make.

Mr. REYNOLDS. Mr. Chairman, that again raises what I conceive to be a very difficult constitutional issue.

I think that the wording of that provision of the Constitution suggests that there is some ability on Congress part to limit the power of the Supreme Court's jurisdiction.

I think that when that provision is read in light of the historical background, and also read in light of some of the decisions that have come down in the area and also within the full framework of the Constitution as a whole, that there are some serious constitutional problems that are raised by suggesting congressional legislation that would take away power of the Supreme Court, in terms of narrowing or limiting its appellate jurisdiction.

I think that if Congress perceives that the Supreme Court has gone awry in a particular area, with respect to a particular subject matter, that there would be, in my view anyway, perhaps less constitutional problems if Congress were to address the particular subject matter specifically, either by way of legislation or a constitutional amendment, rather than seeking to take away power from the Supreme Court in a jurisdictional statute.

CONGRESSIONAL REDISTRICTING

The CHAIRMAN. Mr. Reynolds, as you know, congressional redistricting will be required in many States as the result of the 1980 census. Some feel that certain State legislatures may attempt racial gerrymandering in order to ensure a particular result in a congressional race. What plans do you intend to implement to deal with that situation, if any?

Mr. REYNOLDS. The Supreme Court in *Gomillion* v. *Lightfoot* spoke very directly to the question of racial gerrymandering and said that it was a flagrant violation of the Constitution.

I think that the laws that we now have and the Supreme Court decisions very effectively deal with that kind of activity. Certainly my responsibility would be to enforce those laws.

The CHAIRMAN. Will there be any change in emphasis in the Civil Rights Division in its activities involving prison conditions, or have you had a chance to look into the policy on that?

For instance, do you believe that the recent Supreme Court decision in the Ohio case of *Rhodes* v. *Chapman* concerning double celling of inmates will affect policy at the Civil Rights Division?

Mr. REYNOLDS. That recent Supreme Court decision clearly will be taken into account in connection with the enforcement responsibilities of the Division in that area.

I think that the problem of prison conditions raises a whole host of very complex and difficult problems and situations that have to be dealt with.

The CHAIRMAN. I believe that that decision held that the double celling in question is not cruel and unusual punishment, prohibited by the 8th and 14th amendments.

Mr. REYNOLDS. It did hold that. It said in the totality of the circumstances for that case, it did not think it was cruel and unusual punishment.

My feeling is that there is a role to be played by the Department under the existing Civil Rights of Institutionalized Persons Act which can be constructive, rather than destructive, in terms of seeking out and remedying what are inhumane and egregious types of conditions that exist in certain prisons and institutions.

I think that the primary responsibility should lie with the State, and that the State and local authorities, certainly with respect to State prisons, should be urged to correct or remedy those situations in the first instance to the fullest extent possible.

The CHAIRMAN. Mr. Reynolds, what role should the Civil Rights Division take in entering and pursuing cases that may lead to ultimate resolution in the courts?

In other words, should the Department of Justice take the role of a private litigant when the law is not entirely clear?

Mr. REYNOLDS. I think the Department of Justice's role, where the law is not clear, is to participate in the litigation and impress upon the courts to the fullest extent possible what we perceive the intent of this Congress was in passing and adopting the legislation.

I do not think we have a role to go beyond that to try to urge the court to make law or extend the law beyond what the clear intent of Congress was.

My feeling is that our role is to urge upon the court what the congressional intent was behind the legislation and to have the court interpret the law in that light.

The CHAIRMAN. What kinds of actions can the Civil Rights Division take, short of litigation, to enforce the laws prohibiting discrimination?

Mr. REYNOLDS. Under the Executive order signed by President Carter at the end of his term, the Department of Justice was given the authority to coordinate the implementation of all the laws prohibiting discriminatory conduct in federally funded programs—programs that are receiving Federal financing.

I think in that connection that the Division can play a very constructive role in reviewing and examining the existing regulatory framework in order to insure that those regulations do, indeed, address the matter of prohibiting discriminatory conduct.

The CHAIRMAN. I am pleased to state that the Office of Government Ethics has found your report to be in compliance with the law.

Senator Kennedy had some questions that he wished answered. Would you please answer those for the record?

Mr. REYNOLDS. Certainly.

The CHAIRMAN. We will hold the record at this point for your answers.

[The aforementioned questions by Senator Kennedy, with responses, follow:]

Wm. Bradford Reynolds
Assistant Attorney General-
Designate
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

July 6, 1981

Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

Set forth below are my responses to the questions which you submitted subsequent to my confirmation hearing.

(1) Do you personally support the concept of affirmative action?

I personally support the concept of affirmative action as a response to a proven violation of one or more persons' constitutionally or legislatively protected civil rights. I therefore believe that any litigant who can demonstrate that he or she has suffered injury as a result of another's unlawful discriminatory practices should be awarded a full measure of relief, including affirmative action relief if necessary, in order to ensure that the injured person is placed in the position he or she would have attained had there been no discrimination.

(2) Do you believe it is constitutionally valid? Sound national policy?

I do believe that the use of affirmative action to correct unlawful discriminatory conduct is both constitutionally valid and sound national policy, since such relief ensures that no person victimized by illegal discrimination will be denied the advantages that would have accrued in the absence of misconduct.

(3) Do you personally agree with the positions which the Department of Justice has taken in defending the legality of affirmative action programs administered by other federal agencies?

I have not yet had the opportunity to examine in detail all the legal arguments that the Department has advanced in defending the various affirmative action programs administered by Federal agencies. To the extent that those arguments have been consistent with the concept of affirmative action described in response to your first question, I doubt that I would have cause for disagreement. Where the Department's arguments may have departed from that concept, there would likely be a greater prospect for disagreement; however, a full understanding of the particular facts of each case would be necessary before I could form a personal judgment.

I should add that it is my understanding that a number of administrative affirmative action programs are currently being reexamined in light of recent court decisions and various expressions by some members of Congress that the existing programs are not fully consistent with the purpose of the authorizing legislation. Pursuant to Executive Order 12250

(November 2, 1980), I will, if confirmed, be involved in reviewing those affirmative action programs with the other Federal agencies to assure that they are lawfully promulgated and can be lawfully administered. I therefore do not foresee any difficulty defending the legality of affirmative action programs administered by other Federal agencies.

(4) Do you personally agree with the Supreme Court decision in Fullilove v. Krebs upholding the constitutionality of the congressional determination to enact a contract set-aside requirement in specified Federal programs?

In Fullilove, the Supreme Court failed to advance any majority rationale in explanation of the decision, and it is therefore impossible to make a flat statement of personal agreement or disagreement. Indeed, when Fullilove is read in conjunction with Regents of the University of California v. Bakke and United Steelworkers v. Weber, one is forced to conclude that the Court is itself in sharp disagreement over the constitutional and statutory limits of affirmative action programs. Insofar as the Fullilove ruling upheld the set-aside requirement in the 1977 Public Works Employment Act, I believe that the judgment of the Court should be obeyed so long as it remains the law.

(5) Do you agree with the Department of Justice's past position defending the legality of the successive Executive Orders promulgating the Federal Contract Compliance Program administered by OFCCP?

The Federal Contract Compliance Program has a long and complex history. While I am not fully familiar with the Department's defense of that program in all of its particulars, I do agree that the Government may properly insist that contractors adhere to a norm of nondiscrimination in their employment practices as a condition of receiving a federal contract. I further believe that a valid Executive Order deserves to be treated with the same respect as a Federal statute, and it is therefore incumbent upon the Department of Justice to defend the legality of such Executive Orders and to defend regulations lawfully promulgated thereunder.

(6) If confirmed, would you continue the present enforcement posture of the Civil Rights Division with respect to the Federal Contract Compliance Act?

As stated in response to the preceding question, it is the enforcement posture of the Civil Rights Division to defend valid Executive Orders and all lawful regulations promulgated pursuant thereto. If confirmed, I will continue to follow that philosophy. With particular reference to Executive Order 11246, the OFCCP regulations thereunder are currently being reviewed by the Department of Labor and my understanding is that a number of amendments are under active consideration. As you know, the Civil Rights Division has primary responsibility for enforcing the Executive Order and its regulations, as amended, and, if confirmed, I will see to it that the Division continues to carry out that enforcement responsibility.

(7) In reviewing the policy issues within the Division's responsibilities, have you contemplated any possible changes in the Department's defense of or the Department's enforcement of any Federal affirmative action program? If so, what new positions have you considered and what would be your reasons for proposing such changes?

My review of Division policy is not yet completed and I therefore am not now in a position to speak to such matters as new initiatives or possible direction changes. Nonetheless, with reference to the Division's enforcement and defense of Federal affirmative action programs, I can state that, if confirmed, my present inclination is to place primary emphasis on insisting that remedial relief "make whole" any person who has demonstrated injury ascribable to illegal actions. I will steadfastly support affirmative action policies designed to return those who have in fact been disadvantaged by illegal discrimination to the position and circumstances that they would have enjoyed had they not been deprived of an equal opportunity.

(8) As you know, the Supreme Court has held in Griggs v. Duke Power, Albermarle Paper Company v. Moody, and other decisions, that a violation of Title VII of the Civil Rights Act of 1964 can be established by showing that an employment practice has a discriminatory impact, unless it is shown to be justified by business necessity. Will you continue the Civil Rights Division's present enforcement of this "effects test" in Title VII cases? Would you support any change to Title VII to require proof of discriminatory intent to establish a violation?

As with other civil rights laws, Title VII of the Civil Rights Act of 1964 must be enforced in accordance with congressional purpose and Supreme Court interpretation. Under the cases you mention, Title VII has been held to prohibit employment practices that have discriminatory impacts on protected classes in the absence of a showing that those practices are job-related. As long as this is the law, I will enforce it. Whether I would support a congressional initiative to amend Title VII to establish a discriminatory intent standard would, of course, depend upon a host of factors, including the specific amendment language, the difficulty of proving unlawful intent in "pattern and practice" employment cases, the frequency with which unlawful discrimination might go undetected as a consequence of such an amendment, and what other statutory changes to Title VII might also be proposed. In this regard, one consideration to be weighed in the balance is the Supreme Court's repeated endorsement of the evidentiary use of discriminatory impact to infer an unlawful intent in appropriate cases. I believe that doctrine is sound.

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds

cc: Mr. Paul Guller
Chief Printer
Committee on the Judiciary

The CHAIRMAN. I may have some more questions to submit to you also.

I am going to recess the hearing, subject to questions by Senator Specter when he returns, or any other Senator who is a member of the committee, in the event they come in when Senator Specter finishes.

The hearing will recess for a few minutes.

Thank you very much, Mr. Reynolds.

[Recess taken.]

Senator SPECTER [acting chairman]. Mr. Reynolds, you can tell how interested I am in participating in this hearing to come on three separate occasions.

The votes take precedence over everything, because they only last for 15 minutes, while almost everything else lasts interminably—or so it seems, the way we do so much.

I had gone out for the first vote and had come back to replace the chairman, and then I went to do the same thing again.

I obviously did not hear some of your testimony, so there may be some overlap.

Senator Thurmond had begun questioning on the issues of the Helms amendment and the Johnston amendment.

Let me say, before getting to the substantive questions, that I appreciated the opportunity to meet with you informally when you stopped by my office one day last week.

I have noted your very excellent record, and I would acknowledge the very fine record and excellent qualifications that you bring to the nomination here, Mr. Reynolds.

With respect to the matters which are pending before the Senate at the present time, because the Department of Justice authorization bill was taken so that we could get on with the budget reconciliation which we are on now, one issue which has arisen as a result of one of the amendments is the constitutionality of legislation which would prohibit the Department of Justice from seeking busing as a remedy.

Without going back over the ground that Senator Thurmond covered, what is your view of the constitutionality of the Congress through an appropriations bill prohibiting the Department of Justice from seeking a remedy in a specific category of constitutional case?

Mr. REYNOLDS. Let me try to answer that this way.

I think that probably in the absence of other legislation that might be in the area, if one were just writing on a clean slate, that the constitutionality of legislation of that sort, in my view, would be upheld.

I think that the situation that exists at this particular stage is that there is another amendment, known as the Eagleton-Biden amendment, which is designed to reach a similar result with respect to remedial powers by the Department of Education in this area.

The Court of Appeals for the District of Columbia has held that that particular amendment survives constitutional attack because there is another avenue for the Government to proceed in this area.

The legislation which I believe you are now talking about which is pending, at least in one of its formulations, as I understand it—and there have been a number of different formulations—could well remove the Department of Justice. That would then raise, I think, a very serious constitutional question.

Senator SPECTER. When you say "remove the Department of Justice," what do you mean by that?

Mr. REYNOLDS. Again, I am not sure exactly what the wording is of the different bills that are addressing this point.

Senator SPECTER. The one that I refer to states that the Department of Justice may not use any funds in the authorization bill to seek busing as a remedy in a case where there has been a determination of violation of constitutional rights on segregated schools. That is the specific formulation of one pending issue.

Mr. REYNOLDS. If you are asking me whether that is constitutional or not, my answer is that I think a constitutional question is raised to the extent that one might construe that legislation as removing the Government's ability to fashion an effective remedy in a case where there has been a finding of de jure school segregation.

It at least raises that as an arguable point, in light of the decision in *Brown* v. *Califano.* I suspect now it is *Brown* v. *Schweiker.*

I think it does present that as a possible constitutional issue.

If you are asking how I might come out on that constitutional issue, I am not sure at this juncture that I would reach the conclusion that that legislation was unconstitutional. However, I would want to study it carefully, in light of the *Brown* decision. I think that there is a constitutional question that has been raised there.

I do not know if that answers your question or not.

Senator SPECTER. In light of article II, which gives the executive the responsibility for law enforcement, to put it in broad terms, how can the Congress, which is a creation of article I, tell the executive that it cannot enforce the Constitution as the executive sees it?

Mr. REYNOLDS. I am not sure that that is what Congress is telling the executive.

I think that there is a serious question, certainly in my mind and I think in a lot of other people's minds, whether the busing remedy is a remedy that is essential to enforce the Constitution.

It seems to me that if Congress is going to reach that question and then legislate in that area, the responsible way for Congress to go would be to hold hearings and to determine on the basis of factfinding whether or not busing was indeed an essential element of the remedial package, if you will, in school desegregation cases.

If Congress does not do that and decides that it wants to address the question in a different way, it seems to me that Congress can do it. Whether it is wise or not, we can debate.

Certainly I do not think there is a constitutional problem facially, as far as the statute is concerned. I think where you would have a question on the Constitution is on a case-by-case basis—whether, as applied, in a particular situation, that statute effectuates an unconstitutional result.

I do not see it as one that would be facially unconstitutional.

Senator SPECTER. If the Congress should hold hearings and reach a conclusion that busing was not an essential remedy but the President, through his Attorney General and through his Assistant Attorney General in the Civil Rights Division, concluded that busing was an essential remedy, what superiority does Congress have in saying how the President shall spend the Department of Justice money, contrasted with the Department of Justice making its own independent decision, if the executive concludes that busing is an essential remedy?

Mr. REYNOLDS. For the purpose of this question, I will accept your hypothesis on that. I am not sure that the executive would come out the same way on the issue as you hypothesize.

Assuming what you say, the Department of Justice derives its litigation authority from the legislature. The Attorney General can go in and litigate in a case and initiate an action because Congress has authorized the Attorney General to do that through various pieces of legislation.

It seems to me that if Congress has the ability through legislation to direct the Attorney General to go into court to litigate, similarly, Congress can pare or shape or define that litigation authority through legislation in the manner that it feels is appropriate.

Certainly, it seems to me, if it does it on the basis of a reasoned finding after full hearings that there is a specific remedy that is not essential to vindicate a constitutional right, then I think Congress could do that.

Senator SPECTER. Does the executive have any constitutional authority to enforce the law?

Mr. REYNOLDS. I think it does have constitutional authority to enforce the law, absolutely, and the responsibility to do that.

Senator SPECTER. That comes back to the central question.

I quite agree with you about the enabling legislation, which is on the books. However, if the President makes a decision that busing is an essential remedy and you have a conflict then between the executive's power under article II and the congressional power under article I, I am troubled by the supremacy of the Congress over the executive if they reach different conclusions.

My question comes back to the point that, accepting your answer about the Department of Justice receiving authority through the legislative process, which is certainly true, if you come back to the proposition that the executive has constitutional authority and responsibility to enforce the Constitution and the laws under the Constitution and the President makes the finding that it is an essential remedy, then how can the Congress tell the President not to use busing as a remedy?

Mr. REYNOLDS. Senator, I am not suggesting that you have not raised a viable issue. I think there is a legitimate issue here.

You asked me at this juncture, without a lot of study on it, where I would come out.

Again, I say that I think the Attorney General of the United States and the people who serve under him derive their litigation authority to enforce the laws from the Congress.

My feeling is that if Congress sees fit to shape that litigation authority it can do so in a way that it feels is reasonable to shape.

It may well be that there is a reason to attack it as being totally unreasonable legislation that is not grounded on any basis in fact and is, therefore, vulnerable because it has the effect, for example, of excluding a whole class of people from specific relief or access to the courts and, therefore, is vulnerable legislation under equal protection or due process.

To the extent that it would relate to that kind of argument, I think that you could well attack the legislation as being unconstitutional.

I do not think that I get to the point of saying that Congress does not have the authority in this area to define the manner in which the Attorney General can litigate or the areas in which he can litigate.

If you have legislation that carves out a class of people, and Congress says the Department of Justice cannot act in this area and the obvious effect of that is to isolate a whole class of people from the courts or from a certain area, of relief, then there are constitutional dimensions to that kind of legislation and it is attacked on that ground.

However, I do not believe that was the thrust of your question.

Senator SPECTER. Mr. Reynolds, the whole area is filled with mines, obviously.

The President has said, reportedly last December, that had the measure which then passed the Congress been presented to him, unlike President Carter who vetoed it, that President-elect Reagan would not have vetoed it.

Mr. REYNOLDS. Right.

Senator SPECTER. You have the Attorney General's statement in his ALI speech that he would not seek busing as a remedy.

Mr. REYNOLDS. Right.

Senator SPECTER. All of which raises the question: Why is there any need to limit the Department of Justice in the next fiscal year not to seek busing as a remedy, given the Attorney General's statement?

The danger which is present is: What will the Congress next seek to do by way of a precedent, looking toward this matter, in telling the President and the Department of Justice what the Congress wants the Civil Rights Division to spend its money on?

Do you see that as a potential problem down the road which might require digging in the heels on this one?

Mr. REYNOLDS. I can see it as a potential problem down the road.

I guess that I am not sure, in terms of digging in the heels on this one, that it sort of suggests a slippery slope argument.

I can hear what you are saying, and I guess I am not to the point where, on this one, I feel that in order to hold the dike there is a need to——

I had better back off of that.

The reason I stopped is that when you say, "this one," I am not sure which one we are talking about. There are different pieces of legislation.

Senator SPECTER. Let me be specific.

Mr. REYNOLDS. I think that there are some problems inherent in what I will call right now the antibusing legislative rider that is attached to the appropriations bill.

Those problems, I believe, rise to a constitutional dimension. I personally think that they rise to a constitutional dimension because of the decision that was handed down by the District of Columbia Court of Appeals here in *Brown*.

I also will have to say that in terms of the other constitutional problems that may be inherent in that legislation, the Office of Legal Counsel is the one that has the responsibility to study that. Certainly I do not want to be put in the position of announcing the Department's policy or position from a constitutional standpoint on that legislation in any definitive form at this juncture. I have just not reviewed it that thoroughly.

Senator SPECTER. Do you see your role as one to urge the Attorney General to take positions with the President on whether or not to sign legislation which Congress sends to the White House which restricts the funds on issues which come before your division?

Mr. REYNOLDS. I think that would certainly be an appropriate role for me to take.

Senator SPECTER. What is your view of the proposal to limit the jurisdiction of the Federal courts to impose busing of more than 5 miles or 15 minutes from the home of the student, which are the specific terms of the amendment posed by Senator Johnston which is now on the floor of the Senate or is pending when the bill comes back?

Mr. REYNOLDS. I believe that legislation that seeks to limit the jurisdiction of the Federal courts does raise constitutional problems.

I told Senator Thurmond earlier, with respect to Congress power to limit the jurisdiction of the lower Federal courts, that my own view is that there is more latitude in the Constitution for Congress to operate in that area.

I do feel that there are still some limitations on the ability of Congress to effectuate that kind of result through legislation.

I specifically think that in the case of the *United States* v. *Klein*, it gives us a strong signal that it is not an absolute power.

When the discussion is refined to the power of Congress to limit the jurisdiction of the Supreme Court, I personally feel that at that point there is less latitude in the Constitution for Congress to act in that area.

Senator SPECTER. Is there any latitude?

Mr. REYNOLDS. My own personal view is that it is a bad idea for Congress to be trying to do it.

As I read the law and the Constitution, I think that I would come out on the side of saying that the Constitution does not permit that. That is my general feeling.

On the other hand, I think that you have to be careful when you talk about this issue to understand the precise language of whatever the legislation is.

The general proposition and my feeling is that the Constitution, when read in its historical context and in the context of the document as a whole, was designed to have three branches of Government to serve as checks and balances against one another.

I have a lot of trouble when one of those branches begins to operate in a way that cuts back or modifies or amends the power of another.

Senator SPECTER. I ask the question about any latitude in light of the language of the judiciary article which says that the judicial power shall be vested in the Supreme Court.

Mr. REYNOLDS. I guess if you were just to point me to the article and say, in light of the language, the exceptions clause would suggest that if I did not do anything more than look at the language, an argument could be made that there is some room for Congress to limit the power of the Supreme Court.

However, I do not believe one can simply parse the language and, with blinders on, forget everything else. I think that there are decisions that have come down in this area—not many—which have certainly addressed it. There is an historical context which we cannot lose sight of, with respect to the Constitution and the Bill of Rights.

I think that the whole document is one that should and must be read as a whole. I think when one approaches the question in that overall context, the question that you raise is not one that has yet been decided by any court. I am not aware of any court that has yet decided. It is still open.

My own feeling is that, constitutionally, the Supreme Court's power cannot be modified by legislation. That is where I think I would come out.

Again, I would have to say that it is certainly an area that would require a lot of study of a lot of scholarly writings, as well as some prior court decisions.

Senator SPECTER. I agree with you, Mr. Reynolds, that there has been no decision squarely on it. However, if you take a look at the language of article III, vesting in the Supreme Court judicial power and in the inferior courts power in all cases arising in law or equity and having a constitutional determination of segregation—busing being an equitable remedy—I find it hard to construct an argument that the Congress can say that the Federal courts do not have jurisdiction.

I know of no judicial authority for it. On the face of the Constitution, it seems to me not to have any room. You think that there is some room?

Mr. REYNOLDS. But for the exceptions clause.

Senator SPECTER. What are you referring to?

Mr. REYNOLDS. As far as lower Federal courts are concerned—except as Congress—and I do not have the language.

Senator SPECTER. The Constitution provides that Congress shall create inferior Federal courts as they decide.

Mr. REYNOLDS. That is right.

Senator SPECTER. However, that does not deal with the jurisdiction of the Supreme Court.

Mr. REYNOLDS. I am sorry; I misunderstood.

I thought you said just a few minutes ago all Federal courts, rather than the Supreme Court.

Senator SPECTER. I do include it.

I only refer to that clause not saying anything about the Supreme Court and that clause not saying anything about jurisdiction.

It says: The courts which shall be created. However, it does not deal with the jurisdiction.

Do you view your role as one of advising the Attorney General as to the positions which ought to be taken and a response to a congressional enactment on the subject of limiting the court's jurisdiction if we, in fact, should come to that?

Mr. REYNOLDS. I would think that would be my role, along with others in the Department.

POLICY OF AFFIRMATIVE ACTION

Senator SPECTER. What is your view of the Civil Rights Division of what the policy should be with respect to affirmative action?

Mr. REYNOLDS. The term affirmative action is one that is probably too loosely used in many instances.

My feeling is that where there has been a finding of discrimination, based on race, color, religion, sex, or national origin, that affirmative action should be a part of the remedy in order to insure that those people who have been injured by that discriminatory conduct are put back into the position that they would have been in had it not been for that discrimination.

In addition to that, I think that those people who potentially were the subjects of that discriminatory conduct should also be put back into the position that they would have been in had there not been that discrimination.

Senator SPECTER. Therefore, you would view the powers of the Civil Rights Division to implement a policy of affirmative action where discrimination had placed one particular group or another in a less-favored position than they would have otherwise been?

Mr. REYNOLDS. That is correct where there has been a determination of discrimination and a showing of injury, or potential injury, as a result thereof.

EMPLOYMENT PRACTICES

Senator SPECTER. What do you foresee, shifting to the area of women's rights, as the role of the Civil Rights Division as an outgrowth of the recent Supreme Court decision on employment practices?

Mr. REYNOLDS. That is the *Gunther* decision, I believe. Is that the one you are referring to?

Senator SPECTER. Yes.

Mr. REYNOLDS. As I understand that decision, what it did was give women the ability to maintain lawsuits alleging discriminatory treatment as to wages and compensation under title VII of the Civil Rights Act.

The role of the Civil Rights Division would certainly be to follow that decision and implement it and enforce title VII in the context of that ruling.

Senator SPECTER. How would you assess that as a matter of priorities within the Division?

Mr. REYNOLDS. Certainly that would receive equal priority with the enforcement of the other titles of the Civil Rights Act—section 504 of the Rehabilitation Act, and our other areas of responsibility.

I would not intend for that area to be assigned a lesser role or a lesser place in the hierarchy of priorities than enforcement of the other civil rights statutes.

Senator **Specter**. Where do you place your priorities? If you had to pick the first three items you would direct your attention to as Assistant Attorney General in charge of civil rights, what would you identify?

Mr. **Reynolds**. Do I have to pick just three?

Senator **Specter**. Pick three or more, or three or less.

Mr. **Reynolds**. I think that the field of education certainly is a priority.

Employment rights are a priority.

In the area of employment rights, I would put in both discrimination on the basis of race or sex.

Certainly, enforcement of the Voting Rights Act is a priority.

Senator **Specter**. Do you have a view as to whether the Voting Rights Act should be extended, since you brought it up? [Laughter.]

Mr. **Reynolds**. If I take back my last answer, do you take back your question? [Laughter.]

At this time, I do not have a view on that.

Senator **Specter**. I will not press you on that one.

Mr. **Reynolds**. All right.

Senator **Specter**. Are there any other priorities that you would like to enumerate?

Unlike the Constitution, I think the Voting Rights Act has a lot of issues which probably we ought to pursue with you here. As I say, I shall not press it.

Are there any other priorities which you would care to enumerate which would receive your early attention?

Mr. **Reynolds**. I guess I hate to list priorities, because then I am sort of given the negative inference that I have excluded something that I do not intend to pay close attention to. I do not mean to do that.

I think that there are enforcement responsibilities under the Rehabilitation Act which are going to receive full attention.

To the extent that we are charged with responsibility under the Institutionalized Persons Act, that should receive attention.

Certainly the housing area and the Fair Housing Act would be a high priority area. If I were confirmed, that would be a high priority area that I would want to focus upon.

There are other areas of responsibility that the Department is on top of. I think that they all should receive careful attention.

EXCESSIVE POLICE FORCE

Senator **Specter**. One of the items which has been the subject of considerable attention nationwide is the issue of police excess.

What is your perception of that subject, and how would you see the Civil Rights Division functioning in that area?

When I say police excess, I mean excessive police force.

Mr. **Reynolds**. I do not think any of us would deny that there are instances of excessive police force that need attention.

I personally feel that that is perhaps one of the most egregious offenses, because you have the individual who is charged with law enforcement who is blatantly and flagrantly performing in a way that violates the law.

There are criminal statutes that the Department has responsibility for which do permit the Department, when those kinds of instances are brought to our attention, to review them and investigate them and, where appropriate, prosecute them.

That would certainly be another area of priority if I were made the Assistant Attorney General of this area.

Senator SPECTER. Are you familiar with the litigation which was in process, or do you have any extensive familiarity with the litigation which was in process, in Philadelphia where the Civil Rights Division instituted a suit in the spring of 1979, alleging massive violations and calling virtually for a receivership of the police department? The case was then dismissed. I think parts of it, at least, are pending on appeal at the present time.

Mr. REYNOLDS. I am generally familiar with it, Senator. The case was dismissed. The court of appeals upheld the dismissal. I believe that the case is now still active in the Department and is under consideration by the Department concerning whether or not a petition should be filed with the Supreme Court for a writ of certiorari.

Senator SPECTER. Without getting into the facts of that case, because you could not be expected to know them, would you think that that sort of litigation, seeking that sort of remedy, would be something that would be within the realm of your consideration as Assistant Attorney General of the Division?

Mr. REYNOLDS. I think that that sort of case would clearly be within the realm of my consideration. The case was, as I understand it, dismissed in part because the court felt that the Attorney General did not have the authority to initiate an action—certainly insofar as the constitutional claims were concerned.

As to the title VI claims, my understanding is they were dismissed because the courts felt that the allegations in the complaint were not sufficient to state a cause of action.

If that kind of situation were brought to my attention again, I would have to examine it carefully in light of that decision. I certainly would hope that before I proceeded, we would be able to proceed in a way that would not be vulnerable to a court decision that said the allegations were insufficient.

Certainly I think it would be within our realm to look at it. If those were the kinds of allegations made, then we would have a responsibility to look at it.

Senator SPECTER. Mr. Reynolds, would you initiate a compliance proceeding against a business company without first discussing the matter with the prospective opponent in an effort to seek compliance or an amicable resolution without litigation?

Mr. REYNOLDS. Generally speaking, I think that by far the preferable way to proceed would be to try to reach some kind of settlement of the matter or conciliate before bringing suit.

One of the problems that I have with the question is that in certain areas, the Department of Justice will get cases on referral from the agency after the agency has made an effort to reach an accommodation through the conciliation process.

It is not clear to me in that context what further role would be served by the Assistant Attorney General engaging in further efforts to conciliate.

Senator SPECTER. If that had been present, of course, there would be no reason for it. However, if that had not been present, you would say as a general policy that you would make an effort. You would give notice and try to work it out before rushing to court.

Mr. REYNOLDS. I think that is always the preferable way.

EXPENSIVE PROCEEDINGS

Senator SPECTER. There has been some complaint that litigation has been started by the Department of Justice and then has spawned tremendous and expensive discovery proceedings which make it totally impossible for a small company to defend itself. Would you be sensitive to avoid that kind of problem in your role as Assistant Attorney General?

Mr. REYNOLDS. Having litigated in the private sector for a number of years, Senator, I am not sure who you place the blame on when you talk about extended discovery that is spawned by one side or another.

Senator SPECTER. The proponents of the interrogatories.

Mr. REYNOLDS. The proponents of the interrogatories are often frustrated by the answers that the other side seems to give. That generates another whole round of discovery.

Senator SPECTER. I agree with you that there is no answer to who struck John in civil discovery.

The question has been raised to me, and what I would like is just some indication of your recognition of the potentiality of the problem and an expression of sensitivity to it.

Mr. REYNOLDS. What I was going to say is that I personally do not believe in the tactic of prolonging discovery for inordinate periods of time.

I think discovery, if it is to serve a useful purpose, should be conducted as efficiently and as rapidly as one can conduct it, or as the two parties can conduct it, and you get on with the litigation at hand.

It would not be my intention to bring a lawsuit and then have it followed by extended periods of discovery in an effort to drain the resources of the private litigant and at that point, then, to have him at the mercy of the Department. That would not be the way in which I would conduct litigation or the way I would encourage anybody else to conduct it.

Senator SPECTER. Mr. Reynolds, I said that I was not going to pursue the question of the Voting Rights Act, but I have been handed some questions which I have been asked to propound from Senator East.

I now read from the text:

> The primary purpose of the Voting Rights Act of 1965 was to help members of minority groups gain access to the polls through voter registration.

This is material provided by Senator East.

> In recent years, however, this goal has been abandoned by the courts and the Justice Department.

I will read it myself before I say it. Just a moment. [Pause.] Let me just get to the questions.

> In determining whether to grant preclearance to a proposed voting change under section 5 of the act, should the Justice Department's inquiry be confined to the question of whether the proposed change is intended to discriminate against minority groups, or should the Department also look to the actual result or effect as well?

I am not sure that I understand the question. Do you understand the question?

Mr. **Reynolds**. I think I do, but maybe I should not admit that.

Senator **Specter**. If you do not understand the question, you do not have to answer. [Laughter.]

Mr. **Reynolds**. Right.

However, if I did not, I would probably have to also. Since you are reading it, I had better say I do. That way I can shape the question.

Senator **Specter**. True.

Mr. **Reynolds**. I think what he is asking is whether, under the preclearance procedures of section 5, the Department of Justice, if I were the Assistant Attorney General, would proceed with an effects test or a purpose test in order to make the determination as to whether or not objections should be made to the change. I believe that is what he is asking.

I think that the way the law is now under section 5 preclearance, the test to be applied is an effects test—that is, disparit treatment—and not a purpose test.

The court just recently in the *City of Mobile* v. *Bolden* said that with respect to the Constitution and section 2, the test to be applied is only a purpose test. You have to find a discriminatory purpose in order to find a violation.

I believe the question is whether the Department would proceed with the effects test—that is, that the particular suggested proposed change would have a discriminatory impact.

I think that the way the law is today that would certainly be the test that would be applied for purposes of section 5 preclearance.

Senator **Specter**. Question 2: If the Department is to consider the effects of a proposed change, what factors should be considered in determining whether a proposed change has an unlawful effect? Should the presence of representatives of minority groups in public office be considered?

Mr. **Reynolds**. I think that there are a number of factors that would have to be considered in any given case. I do not know that you can generalize.

I believe that the courts have said on different occasions with respect to the Voting Rights Act that the protection is of the individual's right to vote and to have a meaningful vote.

Without a specific case in front of me, I am not sure which of the various factors would exist in the equation that would tilt the scale one way or the other.

Senator **Specter**. We would like to keep the record open, Mr. Reynolds, to submit additional questions. There are additional questions from Senator East which we simply do not have time to proceed to now.[1]

Senator Hatch asked that this statement be read, and I shall do so.

PREPARED STATEMENT OF SENATOR ORRIN HATCH

Mr. Chairman, I am extremely pleased that this committee is considering the nomination of William Bradford Reynolds to be Assistant U.S. Attorney General for civil rights.

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[1] Questions of Senator East may be found on page 105.

Mr. Reynolds comes extremely highly recommended to this committee, both as an individual with the intellect and administrative abilities to assume this position and, equally important, as an individual with the temperament to fill this highly sensitive position. It is a position that lacks nothing in the way of contentious and controversial issues, as I am confident Mr. Reynolds is more than well aware.

As a member of this committee and as chairman of the Subcommittee on the Constitution, I am looking forward to working closely with you, Mr. Reynolds.

While I have no questions to ask at this point, let me just express very briefly one of the major concerns that I personally have about recent policies pursued by your predecessors. It is something that I would hope we could discuss at greater length, at your convenience.

This involves the increased use by the Civil Rights Division of a test for identifying prohibited discrimination—in housing, voting rights, education, and elsewhere—that looks primarily to numbers and statistics rather than to evidence of some discriminatory purpose or motive.

The so-called effects test or disproportionate impact test is an extremely dangerous test, in my opinion, when used for these purposes.

It has the potential, I believe, to stigmatize innocent individuals and communities as civil rights violators.

It has the potential to impose the Federal Government in the legitimate affairs of local communities and the private sector.

It has the potential to undermine the consensus in this country in behalf of civil rights by transforming the entire focus of Federal civil rights enforcement from a focus upon equality of treatment and equality of access and equality of opportunity to equality of result.

This is not, I contend, what the American people think about when they think about civil rights, and it is not what either the laws or the Constitution of the United States demand.

I hope that you and your division will give extremely careful consideration to the implications of this test for discrimination. It is a pernicious test—one that undermines everything that the civil rights movement has traditionally stood for—by undermining some of the most basic principles of fairness and due process.

Mr. Reynolds, again let me extend my deepest congratulations to you for your appointment. Please do not ever hestitate to contact me if I can be of any assistance to you on any matter.

I wish you the best of luck in your new position.

Senator SPECTER. I want to thank you very much for coming, Mr. Reynolds. There will be additional questions submitted for the record, including some questions from Senator Biden.

We will hold the record at this point for the submission of those questions.

I want to tell you that the absence of more members of this committee here does not in any way suggest a lack of concern about this position. I know the Judiciary Committee views this position as a very, very important one.

There is a tremendous quantum of business on the floor today. People just could not be here today because of that.

We thank you very much for coming and wish you very well.

Mr. REYNOLDS. Thank you, Senator.

Senator SPECTER. The hearing is adjourned.

[Whereupon, at 3:35 p.m., the hearing adjourned, to reconvene subject to call of the Chair.]

[The following questions and responses were subsequently submitted for the record:]

Wm. Bradford Reynolds
Assistant-Attorney General-
Designate
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

July 6, 1981

Honorable Joseph Biden, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Set forth below are my responses to the questions which you submitted subsequent to my confirmation hearings.

(1) Do you have any priorities in civil rights enforcement and if so, in what area would most resources go?

My first priority as head of the Civil Rights Division will be to ensure that all civil rights protected by the Constitution or federal statutes receive energetic enforcement. A network of civil rights laws protect against discrimination based on race, color, religion, gender, age, handicap, national origin or other classification. Any person or persons engaged in conduct designed, directly or indirectly, to deny these protections to others (either individually or as a group) will, if I am confirmed, be vigorously prosecuted. To this end, the Division's resource allocation will necessarily depend on the frequency and gravity of violations detected in the various areas of civil rights enforcement that are within the Division's responsibility.

(2) Given your lack of expertise in civil rights, how do you plan to control the Division?

Consistent with the civil rights policies endorsed by President Ronald Reagan and Attorney General William French Smith, I will supervise and review the litigating strategies employed by the Division in judicial and administrative proceedings to ensure an evenhanded and judicious enforcement of the law. I am confident that my extensive litigation experience in private practice, together with my earlier association with the Department of Justice as an assistant to the Solicitor General of the United States, will enable me to provide forceful and effective leadership of the Division.

(3) The Attorney General has spoken of a need for creative solutions to civil rights problems. What solutions do you have in mind for remedying past discrimination?

I am in full agreement with the Attorney General's view that there is a need for creative solutions to civil rights problems in certain readily identifiable areas. In this connection, there is, in my judgment, the need for a fresh, innovative approach in school desegregation cases so that meaningful and appropriate relief can be fashioned without relying on forced busing of large numbers of students beyond their neighborhood schools. In addition, creative solutions must be found to ensure that efforts to remedy racial discrimination in the field of higher education do not lead to a weakening or dismantling of established black colleges and universities. I also agree with the Attorney General's statement of opposition to the use of quotas in the area of affirmative action unless mandated by federal statute. Creative thinking is, in my view, required in framing appropriate affirmative action relief so as to ensure that the cure for past discrimination -- which should afford the injured parties full redress -- not be wedded to fixed, numerical formulae which themselves have an undesired discriminatory effect.

Admittedly, I do not yet have a ready set of answers to the remedial questions that have been raised. In searching for meaningful solutions to existing civil rights problems, I will, if confirmed, actively seek to engage states and their subdivisions and private litigants in the process of developing measures to correct the evils of past discrimination, since the cooperation of those primarily responsible for compliance with the civil rights laws is, in my view, a key element to effective enforcement of those laws.

(4) The Civil Rights Division must coordinate enforcement efforts of various agencies. Are you committed to exercising that responsibility? How do you intend to do it?

Pursuant to Executive Order 12250 (November 2, 1980), the Attorney General has been charged with the responsibility of coordinating civil rights enforcement efforts of executive agencies under, inter alia, Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; and Section 504 of the Rehabilitation Act of 1973, as amended. Executive Order 12250 provides that the Department of Justice shall develop an implementation plan with time frames and identification of priority activities. I understand that the referenced implementation plan has been prepared and is awaiting my review. I intend to study the plan most painstakingly to ensure that it will provide for a viable and successful coordination of executive agency civil rights activities. Unquestionably, the Government should seek to speak with one voice in the area of civil rights to ensure evenhanded administration of the law. My efforts will be directed toward working closely with the other agencies so that together we can develop and implement uniform policies protecting against unlawful discrimination.

(5) What is your view on decisional law as interpreted by the Supreme Court in the area of affirmative action?

The term and concept "affirmative action" has been used in statutes and Executive Orders and has been interpreted by the judiciary to subsume a variety of remedial programs. In the area of employment, for example, the courts have ordered that affirmative steps be taken on a finding of employer discrimination to eliminate artificial, non-job related hiring and promotion practices and procedures which have the effect of discriminating against women and minorities. Similarly, in other contexts where past discrimination against identifiable groups has been acknowledged or found by the courts, corrective action has been required to "make whole" the injured parties and ensure that discrimination does not occur in the future.

The decisions make clear that an individual victimized by purposeful racial discrimination is entitled to relief that places that person in the position that he or she would have attained in the absence of the violation. With regard to other relief falling within the concept of affirmative action, the courts have addressed the matter with varying degrees of disagreement, and there has yet to emerge any clear and lucid majority rationale indicating what types of preference may be offered to minorities, females, or the handicapped, consistent with federal statute or the Fifth and Fourteenth Amendments.

(6) What is your definition of the legal standard of intent in civil rights law? What role do you see intent playing in civil rights law?

The legal standard of intent in civil rights law, in contrast to an effects standard, generally requires proof that an individual, organization, or government entity undertook action with a purpose of discriminating against a protected group. In the broad domain of constitutional and statutory protections of civil rights, discriminatory intent is generally required to establish a constitutional violation and may well be necessary to prove a violation under some federal statutes; however, the courts have found discriminatory effects to be sufficient to prove a violation under other civil rights statutes where it was ascertained that such was the intent of Congress.

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds

cc: Mr. Paul Guller
Chief Printer
Committee on the Judiciary

Wm. Bradford Reynolds
Assistant Attorney General-
Designate
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

July 14, 1981

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Set forth below are my responses to the questions which you submitted to me yesterday as a follow-up to my confirmation hearing on June 24, 1981.

(1) Previous Justice Departments have contributed to the development of a test for determining the existence of discriminatory conduct that looks to the racial "effects" or "disproportionate impact" of an action, rather than whether or not some discriminatory purpose or intent existed. This test relies heavily upon statistical and numerical evidence rather than upon evidence of a wrongful state of mind. Could you describe your own views on the merits of these tests? Could you describe your own views on the specific merits of these tests in the context of the Fair Housing Act? the Voting Rights Act?

I am generally familiar with the use of both an "effects" and a "purpose" test in ascertaining discriminatory conduct held to be violative of the Constitution and Federal statutes. Insofar as constitutional violations are concerned, I believe that the Supreme Court has regularly required a showing of purposeful discrimination based on race, color, religion, sex or national origin. With Federal statutes, the standard used has largely depended upon the Court's perception of Congressional intent.

Thus, Title VII of the Civil Rights Act has been held to embrace an "effects" test, prohibiting employment practices having a disparate impact on minorities or women. Similarly, the courts have upheld the use of an "effects" standard under Section 5 of the Voting Rights Act (the Preclearance Provision) on the ground that Congress intended to reach under that section changes by covered jurisdictions which have a dilutive or retrogressive impact on the minority vote. This is to be contrasted with the "purpose" standard under Section 2 of the Voting Rights Act as reflected in the Supreme Court's recent decision in City of Mobile v. Bolden. In other areas, such as Title VIII of the Civil Rights Act (the Fair Housing Act), there has yet to be a definitive statement by the Supreme Court as to the appropriate standard, although several (but not all) appellate courts have interpreted the congressional intent as requiring an "effects" test.

My personal view is that the constitutional standard of "wrongful purpose or intent" should apply except in those instances where Congress has required the use of an "effects" or "disproportionate impact" test. In this regard, it is not, in my opinion, a proper role for the Department of Justice to use its litigating responsibility as a vehicle for seeking to rewrite Federal statutes in a manner that Congress never intended. The Department's responsibility is to enforce the laws as written. I will, if confirmed, religiously adhere to that philosophy in seeking to carry out my obligation to provide vigorous and evenhanded enforcement of the civil rights laws of this country.

(2) Article III of the Constitution establishes the appellate jurisdiction of the U.S. Supreme Court subject to "such exceptions and under such regulations as the Congress shall make." How do you interpret this provision? What is the extent of Congress' constitutional authority to limit the appellate jurisdiction of the Supreme Court? What are your views on the desirability of Congress limiting such authority?

As I testified at my confirmation hearings, the question with regard to Congress' constitutional authority to limit the appellate jurisdiction of the Supreme Court is one on which learned constitutional authorities have expressed differing views. I do not presume to be a constitutional expert; nor do I pretend to have undertaken the sort of exhaustive research and analysis which such an issue deserves before one presumes to speak definitively in this area.

With these caveats, I indicated at my confirmation hearing a preliminary, purely personal, view that the appellate jurisdiction of the Supreme Court is not, as a matter of constitutional law, subject to legislative limits at the hands of Congress. This opinion derives from a reading of the Exceptions Clause in Article III, Section 2 (quoted in your letter) in the context of the Constitution as a whole, and its historical evolution.

That document unmistakably divides the responsibilities under our constitutional system of government among three distinct branches: Executive, Legislative and Judicial. Each is to act as a check on constitutional excesses of the other so as to ensure that a delicate equilibrium is maintained among the three. Within this framework, I personally have difficulty accepting that the architects of the Constitution intended, through insertion of the Exceptions Clause in Article III, Section 2, to permit legislative intrusions on the constitutionally derived jurisdictional authority of the Supreme Court (*see* Article III, Section 1), just as I have difficulty with the proposition that the Supreme Court can intrude upon the constitutionally derived authority of the Legislative Branch.

Whether or not it would be desirable for Congress to take such action--assuming its constitutional authority to do so--raises for me a host of separate questions which also do not lend themselves to easy answers. I would anticipate that a number of implications might deserve careful consideration: for example, what legal ramifications might flow from a decision to restrict the appellate jurisdiction of the Supreme Court as to a particular subject matter, leaving the jurisprudence in the area to the diversified interests of the several States; what political response might be expected as a reaction to such a congressional effort; and what might be the practical consequence of establishing such a precedent that could pave the way in future years for similar restrictive action by other Congresses voicing dissatisfaction with decisions of a Supreme Court aligned along much different philosophical lines.

I admittedly have not undertaken to weigh in the balance the above factors in addressing the question of constitutional authority. Nor do I mean to suggest that my listing presumes to exhaust the relevant policy considerations that bear on the question of the desirability of Congress to enact legislation restricting the Supreme Court's appellate jurisdiction. These are matters requiring careful and meticulous attention, going well beyond my preliminary thoughts on the matter.

Such a comprehehsive analysis of the entire question would, of course, not fall to me as the Assistant Attorney General for the Civil Rights Division. My responsibility would lie, instead, in the area of civil rights enforcement, not in the area of constitutional interpretation of the limits on the authority of the three Branches of Government. As to the latter issue, the Attorney General would look to the Department's Office of Legal Counsel for a learned opinion on the entire subject--one based on the kind of in-depth review of the question that I have not attempted to undertake, but have indicated would in my view be required before any definitive response is given.

(3) The 14th Amendment to the Constitution guarantees "equal protection of the laws" for all persons. In recent years, however, the Federal government has encouraged the development of "affirmative action" policies which establish certain categories of "protected groups" subject to preferential treatment in the context of government benefits and policies. What are your own views on "affirmative action" (defined as color-conscious public policies)? What will be the views of the Civil Rights Division under your leadership toward such policies? What are your views on such recent Supreme Court decisions as Weber and Fullilove?

My own views on "affirmative action" are aligned with those of Attorney General William French Smith as articulated in his speech to the American Law Institute on May 22, 1981. As he there stated:

> Similarly, there is good reason to question remedial action of a wholly numerical character--such as mandatory quotas. While well-intended, quotas invariably have the practical effect of placing inflexible re-restraints on the opportunities afforded to one race in an effort to remedy past discrimination against another. They stigmatize

> the beneficiaries. Worst of all, under a quota system, today's minimum may become tomorrow's maximum. * * *
>
> Our *goal* must always be genuinely color-blind state action. This means that race or color or national origin must, for purposes of government decision-making, ultimately become irrelevant. [ALI Speech, pp. 12-13.]

Consistent with this view, "affirmative action" is appropriate, in my opinion, when used in the context of a response to a proven violation of one or more persons' constitutionally or legislatively protected civil rights. Thus, any litigant who can demonstrate that he or she has suffered injury as a result of another's unlawful discriminatory practices should be awarded a full measure of relief, including affirmative action relief if necessary, in order to insure that the injured person is placed in the position he or she would have attained had there been no discrimination.

Beyond this, I believe that the government should not seek race-conscious or sex-conscious remedies which afford preferential treatment to "protected groups". If goals and timetables are to be used in an effort to redress past discrimination, their proper role is to serve not as rigid quotas, but as flexible benchmarks for triggering further inquiry into whether an employer has in fact ceased engaging in discriminatory hiring or promotion practices. In this context, the employer should be afforded a full and fair opportunity to demonstrate that his failure consistently to meet a goal or timetable is due to valid and justifiable reasons.

The overriding objective must be to ensure that those in the work force obtain employment on the basis of individual worth and merit, without regard to race, color, religion, sex or national origin. That will be the guiding principle of the Civil Rights Division under my leadership if I am confirmed. "Affirmative action" programs which fail to adhere to this fundamental principle--which is itself grounded in the Fourteenth Amendment--will be considered unacceptable.

Finally, with specific reference to the recent Supreme Court decisions in *Fullilove* and *Weber*, perhaps the fairest assessment I can make on the basis of a careful reading of the several disparate opinions in those two cases is that the members of the Court are themselves in sharp disagreement over the constitutional and statutory limits of affirmative action programs. Neither case advances an informative rationale for the result reached, and the precedential value of both is certainly questionable in light of the division on the Court. Of course, insofar as the *Fullilove* ruling upheld the set-aside requirement of the 1977 Public Works Employment Act, that judgment of the Court must be obeyed so long as it remains the law.

(4) *What are your views on the role of the Justice Department in initiating or intervening in litigation to promote the rights of persons institutionalized in State medical, psychiatric, and correctional facilities?*

The Justice Department's role in initiating or intervening in litigation to promote the rights of persons institutionalized in State medical, psychiatric and correctional facilities is, in my opinion, a limited one. Under the Civil Rights Institutionalized Persons Act, the Attorney General may pursue litigation in this area only under the most flagrant and egregious circumstances. Where conditions are brought to the Department's attention that border on the inhumane and barbaric, there is, I believe, reason for Federal involvement.

Nonetheless, the Act requires (and, in my view, correctly) that every effort should be made to seek through negotiation and conciliation a voluntary commitment on the part of State and local authorities to correct the intolerable situation existing at the identified institution. It is only after every effort has been exhausted to obtain some sort of cooperative relief on behalf of the aggrieved institutionalized persons, that litigation under the Act is authorized, and indeed warranted.

Even then, the Federal interest is well served by insisting upon adherence to health and safety standards consistent with constitutional requirements. The specific details as to how the particular institution will be brought into compliance are matters to be addressed principally by the State and local authorities who have the responsibility for day-to-day operation of the facility.

Sincerely

Wm. Bradford Reynolds

Wm. Bradford Reynolds

cc: Mr. Paul Guller
Chief Printer
Committee on the Judiciary

STROM THURMOND, S.C., CHAIRMAN
CHARLES McC. MATHIAS, JR., MD.
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ROBERT DOLE, KANS.
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EMORY SNEEDEN, CHIEF COUNSEL
QUENTIN CROMMELIN, JR., STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

July 13, 1981

Dear Mr. Reynolds:

The following are several questions that I would appreciate you answering for the permanent record of the Committee on the Judiciary. Thank you very much for your attention to these.

(1) Previous Justice Departments have contributed to the development of a test for determining the existence of discriminatory conduct that looks to the racial "effects" or "disproportionate impact" of an action, rather than whether or not some discriminatory purpose or intent existed. This test relies heavily upon statistical and numerical evidence rather than upon evidence of a wrongful state of mind. Could you describe your own views on the merits of these tests? Could you describe your own views on the specific merits of these tests in the context of the Fair Housing Act? the Voting Rights Act?

(2) Article III of the Constitution establishes the appellate jurisdiction of the U.S. Supreme Court subject to "such exceptions and under such regulations as the Congress shall make." How do you interpret this provision? What is the extent of Congress' constitutional authority to limit the appellate jurisdiction of the Supreme Court? What are your views on the desirability of Congress limiting such authority?

(3) The 14th Amendment to the Constitution guarantees "equal protection of the laws" for all persons. In recent years, however, the Federal government has encouraged the development of "affirmative action" policies which establish certain categories of "protected groups" subject to preferential treatment in the context of government benefits and policies. What are your own views on "affirmative action" (defined as color-conscious public policies)? What will be the views of the Civil Rights Division under your leadership toward such policies? What are your views on such recent Supreme Court decisions as Weber and Fullilove?

(4) What are your views on the role of the Justice Department in initiating or intervening in litigation to promote the rights of persons institutionalized in State medical, psychiatric, and correctional facilities?

Sincerely,

Orrin G. Hatch

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

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SUBCOMMITTEE ON SEPARATION OF POWERS
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MAX BAUCUS, MONT.
HOWELL HEFLIN, ALA.
JAMES McCLELLAN, CHIEF COUNSEL AND STAFF DIRECTOR

July 13, 1981

Dear Mr. Reynolds:

I would be most appreciative if, at your earliest convenience, you would answer the following questions concerning your views on the Constitution and the Voting Rights Act:

(1) Reversing the burden of proof, which would ordinarily be borne by the Federal Government, Section 5 of the Voting Rights Act and accompanying regulations require the submitting jurisdiction to demonstrate to the satisfaction of a three-judge District Court here in Washington or to the Attorney General that its proposed change "does not have the purpose and will not have the *effect* of denying or abridging the right to vote on account of race or color." In light of the above, I would like to have your specific responses to the following questions:

A. Is this rule of evidence provision of section 5 reversing the burden of proof constitutional in your judgment? If so, on what grounds? What would be your objection to an amendment to the Act transferring the burden of proof to the Federal Government?

B. Regulations issued by the Attorney General candidly acknowledge that "Section 5 ...imposes on the Attorney General what is essentially a judicial function" with respect to preclearance. Justice Black, in his dissenting opinion in *South Carolina* v. *Katzenbach*, and a number of Congressional critics of section 5, have argued that this provision authorizing the Attorney General to preclear proposed changes in State electoral laws is a violation of the separation of powers. Justice Black pointed out, in fact, that the Framers of the Constitution specifically rejected a proposed legislative veto over acts of the States. In your judgment, is this provision of the Act constitutional? Please state your reasons.

C. In the recent *City of Rome* case, the Supreme Court rejected the City's claim for exemption from preclearance and held that, although Rome's electoral changes were enacted without discriminatory purpose, they were nevertheless prohibited under the Act because of their discriminatory *effect*. Such discriminatory effect was said by the Court to be present because no blacks have ever been elected to office in Rome. They represent about 23 percent of the population. Implicit in the Court's decision is the suggestion that the 15th Amendment not only guarantees freedom from racial discrimination in the exercise of the franchise, but also creates a minority right to hold office. In other words, the Voting Rights Act, as a result of Supreme Court decisions, has been converted from a guarantee to equal access to the polls to a right of equal result. In effect, the 15th Amendment and the Act are being used to establish proportional representation. My question to you is:

1. Would you favor an amendment to the Voting Rights Act to confine discrimination to intent, thereby eliminating the "effects test"?

2. Do you favor, as a matter of public policy, the establishment of proportional representation? Of the right of racial minorities to hold office, in contravention of the principle of majority rule?

(2) In your testimony before the Senate Judiciary Committee on June 24, you indicated that you were opposed to current efforts here in Congress to regulate the jurisdiction of Federal Courts. In view of the fact such eminent constitutional scholars as Herbert Wechsler, Raoul Berger, and Paul Bator have stated that Congress clearly has the authority not only to regulate the jurisdiction of lower Federal courts, but also to eliminate the appellate jurisdiction of the Supreme Court; and in view of the fact the Supreme Court has itself subscribed to this interpretation, what is your basis for stating that Congress does not have such authority?

Thank you for taking the time from your busy schedule to give me the benefit of your thoughts on these issues.

Sincerely,

John P. East

Wm. Bradford Reynolds
Assistant Attorney General-
Designate
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

July 14, 1981

Honorable John East
United States Senate
Washington, D.C. 20510

Dear Senator East:

Following our conversation yesterday, you asked that I respond to two questions set forth in your July 13 letter.

Your first question, which is in three parts, concerns the Voting Rights Act.

A. With regard to whether the "effects" standard, written into Section 5 of the Act, is constitutional, I believe that the Supreme Court has so held on several occasions. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); Gaston County v. United States, 395 U.S. 285 (1969); City of Petersburg v. United States, 410 U.S. 952 (1973); City of Richmond v. United States, 422 U.S. 358 (1975). Whether Section 5 should be amended so as to alter the burden of proof as it now exists is, I believe, a matter for consideration by the Department of Justice in connection with its current comprehensive evaluation of the Act and the various proposals for its amendment. If I am confirmed, I would expect to participate in that evaluation process, which the President has asked the Attorney General to complete by October 1, 1981. At this time, however, I am not--without further study of the Department's enforcement history under the Act--in a position to speak on an informed basis to the desirability of any particular change.

B. On the constitutionality of Section 5 in its present form, once again I would refer you to South Carolina v. Katzenbach for a response to Mr. Justice Black's suggestion in dissent that there may be a separation-of-powers' problem. Notably, Mr. Justice Black was unable to persuade any of his Brethren to his point of view. Nonetheless, the constitutional question should be revisited in connection with the Department's overall reevaluation of the Act and its preclearance coverage provisions.

C. With reference to your final inquiries in this area, my personal opinion as to the appropriate review standard that should be employed under Section 5 remains to be formulated after a thorough evaluation of the Department's history of enforcement activity under the Act. Similarly, I have not yet had the opportunity to address on an informed basis the public policy question you have raised. I would, however, be happy, if confirmed, to discuss fully with you and other members of the Committee the decisions ultimately reached in the policy area once the thorough Department analysis is completed.

Your second question relates to my testimony at my June 24 confirmation hearing on the issue of Congress' authority to regulate the jurisdiction of the Federal Courts. Hopefully, I was able in our discussion yesterday to clarify my position for you in this regard. As I tried to point out, there is, in my view, a difference between congressional efforts to restrict the jurisdictional authority of lower Federal Courts (which I feel is legally permissible to a large extent) and similar efforts by Congress to restrict the appellate jurisdiction of the Supreme Court (which I personally believe is constitutionally impermissible).

On the latter point, I am somewhat surprised by your reference to Raoul Berger as a proponent of the view that Congress can eliminate the appellate jurisdiction of the Supreme Court. While Raoul Berger is one of the foremost opponents of judicial activism, I believe that, in his book Congress Versus The Supreme Court, he takes the opposite position from the one you have ascribed to him. I also note that Justice Potter Stewart recently announced that he, too, had serious reservations about the constitutionality of such limiting legislation.

This is not to suggest that the issue has been resolved. Rather, it is simply to underscore the point that there is considerable disagreement as to Congress' authority to act in this area. The Supreme Court in Ex Parte McCardle discussed, but did not decide, the question. It was also considered, but not fully disposed of, in United States v. Klien. Thus, the debate continues to this day.

Let me reiterate in closing that my personal opinion as expressed to you yesterday is preliminary, unresearched and strictly my own. It would, of course, not fall to me as Assistant Attorney General for Civil Rights to undertake a comprehensive analysis of the entire question on behalf of the Justice Department. My responsibility would lie, instead, in the area of civil rights enforcement, not in the area of constitutional interpretation of the limits on the authority of the three Branches of Government. As to the latter issue, the Attorney General would look to the Justice Department's Office of Legal Counsel for a learned opinion on the subject--one based on the kind of in-depth review of the question that I have not attempted to undertake, but have indicated would in my view be required before any definitive response is given.

Sincerely,

Wm. Bradford Reynolds

Wm. Bradford Reynolds

cc: Mr. Paul Guller
Chief Printer
Committee on the Judiciary

CONFIRMATION HEARING ON WILLIAM BRADFORD REYNOLDS, TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

FRIDAY, JULY 17, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Hon. Jeremiah Denton (acting chairman of the committee) presiding.

Present: Senators Denton, Hatch, East, Grassley, and Specter.

Staff present: Joel S. Lisker, chief counsel and staff director, Subcommittee on Security and Terrorism; Bert W. Milling, Jr., counsel, Subcommittee on Security and Terrorism; and Fran Wermuth, chief clerk, Subcommittee on Security and Terrorism.

OPENING STATEMENT OF SENATOR JEREMIAH DENTON, ACTING CHAIRMAN

Senator DENTON. Good morning. The hearing will come to order. We expect Senator Hatch and possibly others at this hearing this morning. We will continue our Judiciary Committee inquiry into the nomination of William Bradford Reynolds to be Assistant Attorney General of the Civil Rights Division.

I regret, along with Senator East, that our responsibilities to other committees, which subcommittee meetings we had to chair, precluded our attendance at the June 24 hearing. I want to assure you, sir, that there was no way we could have been here since we had to chair other hearings. I just wanted to mention that to you because we are not trying to impose another hearing needlessly. We just felt that the importance of this particular question to our constituents was one that required us to ask some questions after reviewing the testimony from the other hearing.

In my view, and I am confident my colleagues will agree, it is imperative that the remaining questions be resolved prior to Mr. Reynolds' confirmation. I am aware that there are those who would be considered liberal who are saying that you may be too conservative and those who are conservative saying that you may be too liberal. Most of us are saying if that is the case then you probably are a pretty good guy.

During the early 1960's there was a need for a Federal focus on civil rights abuses. These abuses were occurring all over the country. No one will ever forget the bombing of the Jewish temple in Atlanta; the bombing of the churches in Birmingham and Charlotte; the brutal murders of the three civil rights workers—Schwerner, Chaney, and Goodman—in Mississippi; the shootings of Viola Luisio and Lemuel Penn. Apart from these atrocity cases, there were serious political deprivations relative to de facto disenfranchisement of blacks.

Over the last 20 years, much has been done or much has been tried to correct or eliminate many of these problems. During all of this and especially in the early years, the Civil Rights Division had a highly visible presence in many Southern States. Its lawyers, together with agents of the FBI, contributed in no small way to identifying and helping to solve many real problems. They were aided in large measure by the good people of these regions who recognized the problems and themselves sought to correct many of the evils which heretofore existed.

In the years that followed, the Civil Rights Division was perceived as moving from what had been a largely reactive role. One could say that it so distorted and expanded its mandate that it soon appeared to become a repository for frustrated activists and others who were bent on changing the world to suit their particular ideals, all this funded at taxpayers' expense.

In fact, certain preconceptions held by Division staff resulted in the targeting of specific regions of the country even after many of these locales had made ample demonstration of a good-faith effort to bring about corrective measures. What occurred seemed to border on vindictiveness, an effort to punish those geographic regions for alleged prior transgressions.

No one is more fully aware that we have not attained the ideal of equality of opportunity for everyone in this country, and there are still problems which must be addressed. However, in considering the great strides which have been made, I believe it may be now time for the Federal Government as a general principle to begin withdrawing from active, direct involvement in otherwise routine civil rights matters, especially in those jurisdictions which have demonstrated a good-faith effort to comply over a substantial period of time. This would permit those States and counties to resolve any remaining problems which may exist on a more voluntary basis.

I am told that a recent President said something to the effect that we will not be able to hear ourselves talk until we stop shouting. I believe that in many cases, well-intended efforts to solve problems by legal means have resulted in reverse discrimination, and yet I acknowledge at the same time that there is still discrimination, not only against blacks but against others.

I believe that one of the messages that the people of the United States attempted to communicate by virtue of the results of the last election was that they desired to change the direction in which the country was going. The mandate given to President Reagan was, in part, based on his commitment to get the Federal Government off the backs of the people and to curtail direct Government involvement in the day-to-day lives of the citizenry.

I think that mandate, in instances which are of importance, does apply to the civil rights field to a degree. We in the Senate have a special responsibility to the people to insure that designees for high office generally share that same commitment, as well as satisfying ourselves that administrative nominees are qualified and otherwise entirely suitable for the positions to which they have been named.

With this background, I would again like to welcome you, Mr. Reynolds. Before you are sworn and given any opportunity to make an opening statement, which you may make, I would like to ask my colleague, Senator East, if he has an opening statement to make.

Senator EAST. Thank you, Senator Denton. I will just wait until I can ask my questions.

Senator DENTON. Would you rise and be sworn in?

Raise your right hand, please, sir.

Do you swear that the testimony which you are about to give before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. REYNOLDS. I do.

Senator DENTON. You, Mr. Reynolds, are invited to make any opening statement that you care to make.

TESTIMONY OF WILLIAM BRADFORD REYNOLDS, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Senator, I understand the difficult scheduling problems which necessitated this reconvening of the hearing, and I appreciate the complications which caused it.

I will assure you that my commitment is to enforce the civil rights laws as they exist, to do that vigorously and energetically and evenhandedly, and to do it in a manner that is consistent with the philosophy and principles that you set forth in your statement just a few minutes ago.

Senator DENTON. All right, sir, you mention vigorous prosecution of the civil rights laws. I imagine it would also be in your prerogative to recommend or request changes in those laws. In other words, I get the feeling from talking with the Attorney General that in some cases there are shared feelings about some of these laws being outmoded in some respects, say with respect to too much emphasis on a given area.

There is an issue involving the continuation of the voting rights business, and there is a theme of thought that it should be extended to all States, not just a few, some of which have gone out of their way to indicate that they are trying to conform, whereas others which are not now under application of those laws may not have done so to the same degree.

One of the reasons that I personally am here today stems from, as you will hear later in the testimony, a very recent action taken from the Civil Rights Division regarding Sumter County, Ala. Believe it or not, by blacks and whites—and a lot more whites heard me talk in Alabama than blacks—but by the whites I am considered extremely liberal on this subject in Alabama, and by all of the blacks who have ever heard me talk or seen me act.

I want to make that straight. You can find that out in my record; you can find it out in what I do from here on in the Senate. However, some of my questions are going to be dealing from this perceived shock of what has recently been done by the Justice

Department, and I must represent my constituents in asking these questions.

In your testimony, page 34, lines 18–21, you stated that people who "potentially were the subjects" of discriminatory conduct should be put back into the position they would have had but for the discrimination. When you said the word "potentially" and the words "the position that they would have been had there not been discrimination," you can be interpreted many ways, one of which would be that you seem to be going far beyond the concept of affirmative action.

Would you clarify what you meant by "potentially"? For example, should a promotion be tendered on a ratio of races in an employment situation once any prior discrimination has been shown? Should special ratios of access to housing in apartments and residential areas be ordered to reduce the effect of prior States' practices? Should loans be required to be made on a racially preferred basis by any bank which once declined to loan money in a racially oriented situation?

Would you just—well, I have further questions and you can handle any or all of these, or handle this original question of clarification any way you wish. I am trying to give you a flavor for the kind of answers, clarifications I am after.

Do you espouse the "rightful place" theory of affirmative action on a class rather than an individual basis? What do you mean by a "finding" of discrimination on line 11, page 34? Do you mean a statistical disparity, as in employment, and does proof of discrimination as to one person constitute discrimination as to a class? I am seeking that sort of clarification of what you meant by "potentially" where the subject of discriminatory conduct should be put back into the position they would have had but for the discrimination.

Mr. REYNOLDS. Senator, my comment in that earlier testimony was addressed to what I understand the law to be today with regard to discriminatory conduct under title VII and how it addresses that problem. I believe that the law as it is today on affirmative action under title VII says that where you have an act of discriminatory conduct and proven liability, that those parties who have been injured or those who are potentially injured, in the sense that an individual declined to apply for a job knowing full well that the employer's conduct was discriminatory and therefore there would be no opportunity for that individual to obtain the job, where that can be shown—that is, an element of actual injury or injury in the sense that that person would have applied and was qualified but indeed was deterred from making an application—that in that sense the relief in the litigation should reach those individuals. If necessary, that relief should embrace affirmative action relief consistent with Congress' mandate in title VII.

It was in that context that I used the word "potential" and meant potential. I believe that that is the way that the Supreme Court has read the statute, and I also believe that it has been read that way in light of the intent of Congress under title VII at the time that it passed that legislation.

Senator DENTON. We are talking about discriminatory action. Would you require proof that such action had taken place, or is there some sort of general inference which one would derive from some action by an employer, say, before this one is there? To what degree would you establish that there had been discriminatory conduct or require proof that there had been?

Mr. REYNOLDS. I think that I would insist on proof of discriminatory conduct. Under title VII there are, as I am sure you know, Senator, two ways in which that could be established: either by purposeful discrimination, or title VII permits use of an effects test in order to determine that there has been discriminatory conduct or discriminatory treatment.

I think that the law as it now stands does permit the use of either of those two standards under title VII for purposes of establishing proof of discriminatory conduct. My feeling is that you would have to have proven discriminatory conduct before you would utilize the affirmative action relief that I was talking about.

I would say that there are many cases in which the parties, at some point after the litigation has been initiated, enter into consent decrees. Those consent decrees are in the nature of settlements, where the Government has made allegations of discrimination and the other party is resisting those allegations.

I think in those kinds of situations, I would believe it would be appropriate as part of that settlement to insist that the employer who allegedly had discriminated be required to cure the injury to those people who were the actual subjects of that discrimination. Now that would not be a specific finding in that context because it is a consent decree entered into prior to ultimate conclusion of the litigation.

Senator DENTON. The rulings which would come out of a finding like that, would they result in a generalization that there be in the future a ratio of races basis in an employment situation, once there had been a particular discriminatory action, or did you not emphasize the individual?

Mr. REYNOLDS. Well, I did emphasize the individual. I do believe under title VII that the Congress has said if you have found discrimination that the obligation of the employer who was discriminating is to cure the past discrimination and to insure that there is no discriminatory conduct in the future.

Senator DENTON. However, the individual discrimination example does not represent a policy which is being used against a class or color and so forth, and if it does——

Mr. REYNOLDS. I was going to add that I do not believe that the requirement of the statute to cure discrimination in the future speaks to or instructs the Department or the court or anybody else to effectuate class relief for an individual wrong. I think that what the law requires is to redress the particular wrong that is addressed in the litigation, and it is not for the court to cure all of the social ills of the world in one lawsuit.

Senator DENTON. Thank you, sir.

My time is up for questions for now, and I will invite Senator East to ask some questions.

Let me recognize that the junior Senator from Pennsylvania, my friend and distinguished colleague, Senator Arlen Specter, is now with us.

STATEMENT OF SENATOR JOHN P. EAST

Senator **East**. Thank you, Mr. Chairman.

I wish to welcome you, Mr. Reynolds. It is a pleasure to have you back. Maybe you would have preferred to spend this morning elsewhere but it is nice to have you back.

I would like to state that my purpose in being here and having an opportunity to be a part of this is to ask you about some specific matters in your testimony, and then to tie those in with a general concern I have about policy change in the Justice Department. Therefore, there is absolutely no doubt in my mind as regards matters of your personal integrity. There is no doubt in my mind in terms of your very distinguished background, educationally and otherwise, so we would want the record—at least I would, and I think everybody else would—to show that there is not the slightest reservation about any of those things. In fact, one could only applaud them.

The point I would like to make at the outset here is that I feel as a Senator, in confirmation hearings—whether it is you or the Attorney General or a Justice of the United States Supreme Court or whatever it might be—it is essential that we have some idea of the general constitutional and judicial, legal philosophy of those being appointed to critical positions. I am on the Energy Committee, we did it with Secretary Watt, we did it on the Labor Committee with Secretary Bell. You are in a very critical position in the Justice Department.

The details one can argue over ad infinitum, and they are important, and they can give some measure or index of one's general judicial philosophy. Therefore, I use them as a way of getting us into a bit of a dialog here, within our time limitations, on where we seem to stand.

The election of last November, in my opinion, did indicate a desire to get some fundamental change in the American system, to restore a greater sense of balance in terms of separation of power in the legislative function, which has been greatly eroded in recent years by not only the judiciary but the executive branch, your branch, the one you are going into. We have suffered a heavy erosion of our policymaking power.

I would contend under our Constitution and the fundamental political theory underlying it, we ought to be—I agree, there are tough questions to call on it—we ought to be the fundamental policymaker on the most enduring questions that permeate the American political system—not the Supreme Court, not the executive branch. I sense the President is strongly committed to that, too. That was a part of his mandate, and you represent the President in the Justice Department.

Federalism: An enormous imbalance has occurred in the federal system in recent years. The balance has been tipped overwhelmingly towards the central Government, to the great consternation of many people in this country and to the President of the United States. There is no question about it that this President was elected by many, many people who felt he would help restore that balance to State and local level.

Now if we do have a mandate of sorts, if we do have a desire of sorts to try to restore the balance in separation of power, first as regards the Congress and second as regards federalism—tipping power more to the State and local level—to get to my point, I have found some things in your testimony that were deeply troublesome on that score. If we confirm appointees who do not share that conviction, it would seem to make those goals very difficult to realize.

I think the democratic process is frustrated. The results are clear; the political leadership is clear on it, yet the appointees are not clear on it, and often the further down you go into the bureaucracy, the less clear it is. Quite frequently, their attitudes are at odds with and hostile to that of the political leadership they are supposedly representing. For those people out on the political firing line it becomes increasingly frustrating and difficult to know, how do you affect policy change in the democratic society, because you are constantly circumventing and frustrating the legislative process, the elective process.

In my first round of questioning here, let me get to a specific or two, realizing time is precious and we are going to have to have a sense of priority. I was most troubled by your clear and categorical statement in testimony—which I could read but you are familiar with it, and you and I have talked about it—that under article 3 of the U.S. Constitution where we are expressly told that the Supreme Court has appellate jurisdiction to the extent that Congress sees fit to give it, the so-called exceptions clause, that in your testimony you did two things: One, you said in your judgment we did not have that power, we did not have it. Second, it was clear from the testimony, and I would be happy to read it, that even if we had it, it would be unwise to use it.

Now as a Member of the Senate, as a legislator, part of the legislative body, here I have a major figure going into the Justice Department, into the executive branch—which has been one of the branches of the other two that have been eroding away our power—and conceding at the very outset that we do not even have the power expressly granted to us, it seems to me, under article 3.

Now I am not contending you cannot have your point of view on it but to me, the language is very express. If we concede the power to withhold the appellate jurisdiction of the Supreme Court, we concede as one of the three major branches of Government a principle and fundamental check or balance that we have against the judicial branch.

One might question whether we ought to use it in a particular case. I understand that. There can be strong differences of opinion, again, on the policy wisdom of removing it in a particular case, any case, or all cases. However, the problem from a legislator's standpoint is, to concede that that is a valid position, that is a sound constitutional position, I find wholly indefensible.

As chairman of the Subcommittee on Separation of Power, if we are going to be able to make the restoration, to try to bring about a greater balance in terms of separation of power and federalism, we ought not to be forsaking at the very outset of the dialog the very express checks and balances we have been given there. I get very troubled if I see members of the judiciary saying we do not have those powers.

Then when I hear members of the executive branch saying, "Yes, that is true, you folks do not have that power," I would think that ultimately, once we get their ear, Members of the U.S. Senate would be interested to know that the high appointees in the Justice Department do not think we have the power under article 3 to alter the appellate jurisdiction of the U.S. Supreme Court.

I would like to get your comment on that particular point: Do we not, as Senators, if we confirm you, acquiesce in the notion that certainly one high-ranking official in the Justice Department feels we do not have that power, and if we did have it we ought not to exercise it?

Mr. REYNOLDS. Senator, you and I have had a discussion about this in your office on this point, and I would agree with you that we have a different view as to how that particular article of the Constitution should be read and construed. As I told you at that time, and I also believe in a subsequent written response to the questions that were submitted to me, I indicated that I am not and do not pretend to be a constitutional expert, and have not thoroughly researched that point as extensively as I would want to research it before giving my final, definitive conclusion on the matter.

I am not the person in the Justice Department, if I were confirmed to the position of Assistant Attorney General for the Civil Rights Division, who would be called upon by the Attorney General to do the analysis and render the kind of learned opinion that the Attorney General I am sure would want before he took a position on this matter.

Senator EAST. Let me, if I could, Senator——

Senator DENTON. Surely.

Senator EAST. Cut me off, I know you will, when my time has expired here.

If I might, Mr. Reynolds, the agony I have with that is—when Senator Specter at the hearings put the question to you, you said, "My own personal view is that it is a bad idea for Congress to be trying to do it," meaning on the appellate jurisdiction issue. "As I read the law and the Constitution, I think that I would come out on the side of saying that the Constitution does not permit that. That is my general feeling. On the other hand, I think that you have to be careful when you talk about the issue to understand the precise language of whatever the legislation is.

"The general proposition and my feeling is that the Constitution, when read in its historical context," and here you begin to wax philosophical, "and in the context of the document as a whole, was designed to have three branches of Government to serve as checks and balances against the others. I have a lot of trouble when one of those branches begins to operate in a way that cuts back or modifies or amends the power of another."

Of course, my argument would be as a member of the legislative body that it is the judiciary, the Supreme Court that has been eroding away our power with a reckless disregard for a sound conception of separation of power. We are looking at an express power in the Constitution, given to us under article 3 by the framers, that we might ultimately decide if it got so bad that we could withdraw the appellate jurisdiction.

You do become quite philosophical here and do not think that is a good idea, and I find it particularly curious that your rationale is, it would violate the notions of separation of power. My argument would be on the theoretical problem, that if we do not have legitimate checks given to us expressly in article 3 to curtail the judiciary, ultimately as a matter of separation of power you are creating a judiciary and a Supreme Court that is totally autonomous and free from any really serious check or balance except constitutional amendment, which you point out in here you think is the better road to take.

Then that, if I might just pursue it one step further, that converts the Senate—and the Senate is going to have to think long and hard on this—that converts the legislative function of the Senate increasingly over time into a totally different function than that given it by the framers. We have a legislative function to make policy by simple majority vote. Increasingly we are told our function as a practical matter is to amend the Constitution, which takes a two-thirds vote, and then we begin to share the power with the States.

The amending power was not considered to be the fundamental way that we affected policy in this country. It was considered to be an exceptional remedy, where maybe all other things failed, or where we wished to change some express provision of the Constitution that we had subsequently learned was not appropriate, and we rethought it and wished to change our minds.

I do not wish to catalog here a chain that you think I am pursuing at too rapid a pace but getting back to my fundamental point on this jurisdictional question, I may, more so than any other colleague—in the Senate, on the Judiciary Committee, or whatever—I may be too deeply concerned about a high member of the executive branch saying we do not have the powers that we are expressly told we have in article 3.

However, I am deeply troubled with that. I gather what you are saying is, in effect, maybe you overstated your case here, that you are not quite sure, you would want that to be studied more thoroughly. Is that what you are saying? Here you are quite philosophical about it and quite specific, now.

That is what ran up a little bit of a caution flag for me when I went over the transcript because, as Senator Denton had indicated, unfortunately we could not be here that day. However, I went over your transcript very carefully because I wanted to see if your philosophy—constitutional and otherwise, judicial—was consistent with what I understood this administration's philosophy to be and frankly with what I understood ours to be on the Judiciary Committee.

Is your position now different than the one I have read here in the transcript?

Mr. Reynolds. I do not believe my position is different, Senator. I was under oath when I testified before and I would not begin to suggest that the testimony that I gave was anything less than honest testimony.

What I said before, and what I have said in response to written questions, and what I will say again is that as I understand that constitutional question from a preliminary consideration of it, I would come out on a side different than the one that you come out on.

I have also acknowledged that the question is one that is hotly debated. I believe that there are any number of legal authorities and noted authors who are divided on this question. Mr. Justice Potter Stewart, in his recent statement when he resigned from the Court, indicated that he may well not be in total agreement with the position you stated, and there are others.

My point that I made in direct answer to a question from the chairman in my initial hearings, and then followup questions from Senator Specter, was that my preliminary view of that question would indicate to me that the congressional authority is not there. I understand and appreciate that you hold a different view and hold it strongly.

I also acknowledge that before one should come down with any kind of firm view on this matter—and I am not anywhere near the point where I hold my view as firmly as you do because I have not researched it to the extent that you have—that research should be undertaken, and there should be a careful analysis of the whole question before the final decision is made. However, I would be less than candid if I were to say to you today, Senator, that the testimony I gave before was anything less than honest testimony.

Senator EAST. I am not questioning the honesty because on matters of, well, constitutional and judicial philosophy, it is a matter of perhaps reflection upon things or modification of one's position upon further reflection. I would not for a moment want to imply that I had spotted an inconsistency and hence a moral question, of course not.

You were responding to a question from another Senator on this point and reflecting as you saw it at that time. Now you are responding to me after I have set somewhat of a different perspective on it, and I can appreciate that all of us now and then on change in circumstance can get a little different slant on things as difficult sometimes as philosophy.

Therefore, I guess we are conceding—and I will turn it back to Senator Denton—that you and I are at odds on this point, not that the world will collapse or go into apoplexy because you and I disagree on something. I just wanted to make it clear for the record that you and I are in disagreement over this power of the Congress under article 3 to withdraw the appellate jurisdiction, not only whether we have the power but, am I not correct, we are also in disagreement over—even if we had it—the prudence of doing so? I presume you feel those would be bad precedents to set. If we did it in one case, then we might be doing it in another, and so on and so forth.

Mr. REYNOLDS. I do not believe that was the point I was making, the second aspect of it. Let me, if I may, take what you asked me in order.

Senator EAST. Yes.

Mr. REYNOLDS. I do want to reiterate that I acknowledge that one can change his position or view or get a different slant with further reflection and study of the question. I have not undertaken that because it is not really in my responsibility as the head of the

Civil Rights Division to undertake that. That would be something that would be done by the office of legal counsel.

All I am trying to indicate to you is that now I believe we do have a disagreement but I also would acknowledge that yours is based on much greater research and analysis of the question than I have undertaken or am required to undertake. That is the first point.

On whether it is a bad idea or a good idea, my response there was directed to—was made in the context of saying that at the present time I did not think the power was there. It would seem to me that if that is the major premise, for Congress to proceed down that road and then to be told at the end of the battle that they lost the war, could well be more damaging to what the Congress was trying to achieve and for that reason would be a bad idea.

Therefore, I think you turned it a little bit on me. I was not conceding that the power would be a bad idea. What I am saying is that, given my preliminary view as to where it is, I would think that it would be a bad idea.

However, again I acknowledge that this is something that is in open debate. There is an argument on the other side to the effect that if it is open to debate, maybe we should go ahead and do it and leave it to the ultimate decisionmaker as to whether or not it will survive. That, of course, is another question that one could debate but I just want to try to explain what I meant when I said it is a bad idea.

Senator DENTON. I want to make clear to you, sir, as well as to everybody in this country and the world, for that matter, that it has been all my life a fervent hope, ambition, actively pursued goal—equality of opportunity for all, irrespective of race, religion, et cetera, as stated in our Declaration of Independence, which means a lot to all of us as sort of the foundation of our Government philosophy—I want to see that realized.

I have gotten in fistfights about this when I was a kid in the fifth, sixth, seventh, eighth grades, so for somebody to laugh when I say that is rather painful for me. I have taken the risk during my campaign in Alabama to be very forthright about these statements to all white audiences, and they sent me up here, the first Republican since Reconstruction.

I know in my heart that I am stating the truth, and would do so under oath, that I am trying to achieve the same goals for which the Civil Rights Act was set up. The difference that I have with the way it is being pursued is that I believe that in many cases some of the well-intended laws, brought out at a time in which some of them were justified, are having the opposite effect than that which the act was originally intended to bring about.

I believe we are in some cases distorting situations. We are having reverse discrimination. We are causing feelings of resentment and actions which would not otherwise be caused, to the detriment of reaching those goals in some cases. I do not categorically reject the need for some kind of civil rights act being pursued.

An example of what I am talking about: On page 40 of the transcript of your previous testimony, Senator Specter asked you if you would initiate a compliance proceeding against a business company without first discussing the matter with the prospective opponent in an effort to seek compliance or an amicable resolution without litigation.

You responded that generally speaking, you thought by far the preferable way to proceed would be to try to reach some kind of settlement of the matter or conciliation before bringing suit; that you thought it is always the preferable way; that is, to try to work it out before rushing to court, and of course I agree with that.

Why was this procedure, however, not followed by the Civil Rights Division prior to suit being filed against Sumter County, Ala., on July 14, 1981, just several days ago? Without my being notified, and I happen to be the Senator from that State, that was filed in the northern district of Alabama to enjoin the county from implementing the proposed voter reidentification plan.

In this case, all efforts to resolve the dispute were initiated by the county, none by the Justice Department. The Justice Department had waived any objection to the proposed plan, which was asked for by the black residents, acquiesced in by the white judge, and he initiated the plan to reidentify the voters.

This plan was implicitly approved by the Justice Department because they communicated no difference with it within the 60 days allowed for such communication. Now they stick them with this suit. Now those people are upset down there, and my initial information, all of it is to the effect that such objections that do exist to the manner in which the reidentification plan is being pursued and planned, those objections are from very few and they are not justified.

Nevertheless, why—by the law which said within 60 days the Justice Department was supposed to object or keep silent—did they suddenly institute this suit? Did you have any part in making that decision to file suit? Have you become familiar with the case? What would be your policy in handling similar cases if confirmed as head of the Civil Rights Division? Actions like that do not promote racial harmony nor do they promote trust in the Justice Department's Civil Rights Division.

Mr. Reynolds. Senator, what I said in my testimony on page 40, I certainly would follow. I believe fervently that one should, prior to initiating litigation, engage in an effort to resolve the matter.

At the present time, I am not confirmed by the Senate to be the Assistant Attorney General for the Civil Rights Division, and therefore I am not in a position to implement or effectuate that policy. I would certainly do so immediately, and with regard to the matter that you have mentioned, if I am confirmed, I would immediately endeavor to get in touch with the people in that area, Sumter County, and seek to work out whatever those problems might be.

Senator Denton. If you are familiar with the case, what is your feeling about the process by which, having indicated approval without having made objection within 60 days, a suit was summarily slapped on that county?

Mr. Reynolds. Senator, I really am in no position to speak to that process at this time. As I say, if I am confirmed, then I would be in a position to perhaps——

Senator Denton. Therefore, I understand you did not participate in that decision from your office in the Justice Department?

Mr. REYNOLDS. I am not in a position at this juncture to be participating in decisions.

Senator DENTON. Well, that is the kind of counterproductive, misguided, and sort of arrogant, insulting act that is causing some frustration among my own constituents, and which leads me to ask some of these questions.

The effects test under title 7 is not explicit in that act. It has been developed as a result of court interpretations urged by previous Justice Departments. Are you suggesting that you are invariably going to acquiesce in such previous efforts by the Department? Are you going to make any effort to reverse such efforts when you feel that they were inappropriate or inconsistent with your own reading of the law?

I believe we are into a context where there are parallels, other laws, needed at the time, reacting to situations which were indeed bad. I did not want blacks in the backs of the buses. I did not want them unable to use the same restrooms that whites were using. I was very outspoken about that, and that is how I got some black eyes and chipped teeth.

However, I see now in an originally inspired effort to give a kick in the seat to people to get down into their consciences and consciousnesses and question themselves, I see that things have overswung in terms of pendulum. I see it having residual effects, such as concentrating on a geographic area.

Blacks are returning to Birmingham, Ala., by the droves. I have talked with them on the airplanes and so forth, and they tell me it is a lot better back there than it is in—and I will not name the other places. They do not like, any more than I do, the fact that it is those States and those cities which are being maligned by a liberal press, and as I say, we have to have some liberality of the press or we will never make progress toward constitutional ends.

However, these are simplistic generalizations that are being made and they are unfair generalizations, and as I say, they are counterproductive to progress toward achievement of equality of rights, in my opinion.

Would you be at all empathetic with that kind of look at it, that there may be some kind of review necessary as a result of court interpretations urged by previous Justice Departments? Are you openminded about looking at it from now in terms of what the need is, rather than looking at it from the inheritance of laws which were enacted back when the need was different?

Mr. REYNOLDS. Absolutely. I think that is the correct approach and the way that the laws should be looked at and the way that they should be enforced. I do believe that where Congress has spoken, my constitutional obligation would be to enforce the laws. Where it is into a realm, as I believe you were talking about, where there is room for interpretation of the laws and the question goes to whether the Department is going to rewrite the laws or try to extend the coverage in particular areas, my philosophy is very much to read the legislation as Congress truly intended it to be read and to apply the laws in that respect. I believe that I am in perfect agreement with what you were saying was philosophically the approach that you preferred in that regard.

If I have not been responsive, maybe I did not hear the whole question.

Senator **Denton**. No, you were responsive and I appreciate it. You are dealing with a man who is much less expert with constitutional law than my distinguished colleague from North Carolina, and frankly less familiar with lawmaking in general than most of my colleagues but I am deeply grounded in that subject of racial relations. I am supposed to be a logician, and I think you did communicate with me what I was trying to get at.

In all fairness, since during the campaign I was speaking to audiences almost entirely white with very few exceptions, I want to state here—where there are some blacks and where we have a group from probably all over the United States—one of my favorite campaign stories I would tell after I would get some elaborate and undeserved introduction about some things in Vietnam.

I would disown my worthiness for the introduction and then say:

> If you want to know who the real big hero, the real unsung hero of the war in Vietnam was, it was the black corporal walking point in the jungle at night, knowing that each step he took he might step on a land mine and blow himself up, and yet he made the decision second by second to place one foot in front of the other, in response to a draft call from his country, a country which was being ripped apart back home by racial turmoil, and with the Communist propaganda pouring out to him saying, "Your country is no good; it is ripping you off."

That man to me was indeed the hero of that war, and there are lots of them walking our streets today being heroes and heroines in just the same way.

I want you to know that on Memorial Day 1980, in accepting a speech engagement that had been made before I got into the campaign, I mentioned that to a bunch of the"redneckiest-looking" people you will ever see in your life in Ashville, Ala. Most of them were sitting down; they had dogs with them and kids, and there were a few blacks out there but I would say 95 percent of them were white.

When I told that story, the ones who were sitting down stood up and they applauded for about 2 minutes. We have that in the South now. Don't smash it. Feed on it—develop it.

There were stories told to me by men in the audience who had served in Vietnam who said—and I do not mean this to be misinterpreted—but if there was a white guy from Illinois wounded and a guy from Mississippi, and a black guy who was not wounded and he had to help one of the others, all other things being equal he would help that guy from Mississippi.

There was camaraderie. I have a lot of people on my staff here who served in Vietnam and who feel the difference between the way it is in the service and the way it is outside. There is no difference in that quality of blood being shed for this country, there is no difference in the quality of regard for family among black and white, and I am going to try to bring that out. I say that in fairness to myself because, in spite of saying things like that in my own State to white audiences, I am here, and I mean what I say about caring about equality of opportunity.

Go ahead.

Senator **East**. Thank you, Senator Denton.

Mr. Reynolds, if I could take one more swing at the jurisdiction question, and then I would like to get some clarification additionally on the affirmative action and the Voting Rights Act. We will make that as concise as we can, appreciating your time problems and ours.

Again, in article 3, just to read it for all of our edification here, article 3, section 2, paragraph 2: "In all cases affecting ambassadors, other public ministers and councils and those in which a State shall be party, the Supreme Court shall have original jurisdiction," in this critical sense. "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and to fact, with such exceptions and under such regulations as the Congress shall make," period, no ands, ifs, or buts.

I am just curious, since we are all lawyers here—granted, often the world is more complex than the literal reading of something, and I appreciate that—but you acknowledge in your testimony that the issue has not been settled definitively. I would argue perhaps the reason it has not been is that there is no need to. The Constitution is rather definitive on the point.

I am curious as to how one—which your testimony clearly brings out, as we have already indicated—how one even entertains the idea that the Congress does not have the power to withdraw the appellate jurisdiction of the U.S. Supreme Court in any or all areas, in view of that very express provision. It almost makes me wonder—I do not mean to question motives but the wish is farther to the thought, that is, the horrendous thought of the Congress withholding appellate jurisdiction. Who ever heard of such a thing? "My gosh, those fellows could do havoc to us." True, the framers gave us great power here, bless them.

Therefore, all of a sudden, spun out of wholly new cloth one hears the argument that, well, let's raise the question and throw up the doubt whether they have it or not. Is that not spun out of wholly new cloth? If words mean anything at all—and I appreciate that they can mean different things in different contexts, and reasonable minds and prudent minds can differ over things. Gosh knows, if lawyers do not know that, no one does, but finally even we lawyers reach a point where words are meaningful. Contracts are read by the express language they contain, that A and B agree to do this, and these are the obligations of A and these are the obligations of B and so forth. We are all used to that.

How could the framers have been any more express about this? How could there be the slightest doubt in anyone's mind about it?

Mr. **Reynolds**. Senator, I am tempted to refer you to Mr. Raoul Berger's book, "Congress v. the Supreme Court," where he has devoted a full chapter to this subject. As you know, he was probably the foremost opponent of judicial activism, and he has given in that chapter a very careful and thoughtful—as I read it—analysis of the constitutional history, its background, and the framers' intent. He has there set forth the position that suggests that the Exceptions Clause was intended to be read only in the light of the ability of the Supreme Court to exercise its appellate jurisdiction as to fact questions and not to questions of law.

I think that on the basis of that analysis he reaches the conclusion—and he of course is one of those people in the forefront decrying the excesses of the Supreme Court in its interpretation of the 14th amendment—he reaches the conclusion that we should read the Exceptions Clause in its context, and therefore that it does not suggest that there is the ability in Congress to eliminate the appellate jurisdiction of the Court.

Senator EAST. Let me tell you my anguish over that. First of all, we are now talking about Raoul Berger, a very distinguished constitutional scholar but recently in the Wisconsin Law Review he has written an article indicating the other way, and he has indicated that the Helms bill on the prayer issue, there would be the power to withhold jurisdiction.

All that aside, all that aside, the trouble I have as a Member of the U.S. Senate is when I start getting—I call them gratuitous—gratuitous evaluations from the academic community or the executive branch or wherever, that we do not have the express powers given to us in the Constitution. If I were before a court of law and I had to choose which side I thought would be the most winnable before a fair and objective judge, in view of that language in article 3 I do not see how any lawyer could say, "Oh, my gosh, let me have that case, it is clear as a bell."

The only way one can begin to undermine it, and you are suggesting it, is to go out and maybe find a constitutional scholar somewhere who wrote an article somewhere suggesting maybe it was not quite that way. I would argue frankly in Berger's case—and we could go back and forth on this one—but that Berger has argued it the other way too.

Berger is not critical here. What is critical is what this administration hopes to accomplish and what the Senate feels its legitimate prerogatives do. I think the U.S. Senate and the U.S. Congress have been pusillanimous in recent years in simply acquiescing in bureaucratic control, acquiescing in judicial tyranny. At some point I would hope they would get enough members of this body who would rise up and say, "Let's see what we can do to begin to shape policy in this country." That means examine the Constitution and look at the checks and balances that we have been accorded.

I will submit, I will argue to my dying day—I do not care what Raoul Berger or anyone else says, bless them—that on the express language of article 3, if we will not stand on that we will not stand on anything. If we would be frightened off on that, we would not stand anywhere on anything and we are left with what you suggest in your testimony: Ultimately, the only way we can modify, for example, judicial tyranny or judicial usurpation, is simply to amend the Constitution.

As I have indicated to you, that totally alters the legislative function. It is a dramatic change. It is a mutation and aberration of enormous proportions, whereby the legislative function of the U.S. Congress on fundamental policy questions is now converted into an amending of the Constitution function on policy questions. This means we must have two-thirds vote; we now share that power with the States; it means enormous problems of federalism, let alone separation of power.

If the U.S. Senate thinks that is good philosophy for the long run or the balance of this century, and they are willing to acquiesce in the very tools the framers gave them, then I say, "So be it." I mean, they are entitled to do it but as one person, I am going to raise a voice crying in the wilderness. I query the wisdom of it.

Now that does not mean that you, as one possible appointee, have to bear the full burden of all of this. However, as one Senator I am troubled with appointments to high office in the executive branch, the Justice Department, in the bureaucracy, if you will, who share a point of view that would clearly take away one of our most fundamental checks and balances.

We may decide never to use it, as a matter of prudence and wisdom, and one could make that argument. It is not good; it is not a good precedent. We would want to use it very carefully and prudently. However, I suspect the framers put in it for this reason, that if the other branches became excessive, if we had gone beyond the point where they were respectful and showed restraint and we had no recourse, we could pull the plug.

There is no question about it, in the U.S. Constitution, that the legislative branch, the Congress, is first among equals. It can emasculate the courts. As you acknowledge with the lower Federal courts, we could abolish them today. You will acknowledge that. You do in your testimony. That is clear and categorical.

If they gave us the power to abolish the lower Federal courts—and it is frankly a little bit more vague as to the jurisdictional question on the lower Federal courts, which you concede we could do—but when it comes to the U.S. Supreme Court on appellate jurisdiction, that is a categorical statement. Article 3, read in the full context and read in light of article 1, clearly as a matter of political theory in representative government the Congress is first among equals.

It has been the Congress of the United States in recent years that is accountable to the American people for the erosion of its policymaking function. When you go back into the States and you discuss and you campaign, and in effect the people say, "Well, can't we regain control," the answer seems to be increasingly from so many quarters, "No, the judiciary will control this, the bureaucracy will control that."

We end up being ombudsmen, trying to come up here and beg for mercy from the bureaucracy and trying to find some way or other whereby we might begin to curtail the excesses of the court. I begin to feel we are doubleteamed: The judiciary hits us on the one side with judicial legislation of the rankest kind. Then we go over to the executive branch and we are beginning to look at what we might do to counter it, and the executive branch comes along and says, "Oh, no, you do not have those powers. Who ever heard of such a silly thing?"

Increasingly I begin to feel—I do not wish to sound paranoid about it—I begin to feel we are being conned. We are being doubleteamed. We are being doubleteamed by the judiciary, we are being doubleteamed by the executive branch. I can report for one State, the State of North Carolina, people are plumb flat weary of it.

It is one of the reasons that President Carter got in so much trouble. He had no control over the executive branch, over the bureaucracy in so many areas. It was a constant source of embarrassment; it was a burden he just finally could not bear at the polls any more.

Again, I do not wish to go on ad nauseam about the thing but I just cannot for the life of me see how we can concede something as express and concrete as that particular power is. I know you take a different point of view and I do not wish to belabor the point but I consider it, in our discussion here, the most fundamental cleavage we have.

On these other things—and perhaps my time has run out, and I notice our distinguished colleague, Senator Grassley, is here—but I think the testimony in here on affirmative action is less troublesome perhaps than this. The Voting Rights Act, I think, as it has been applied and interpreted is not only violating notions of separation of power but federalism.

If we cannot get changes in these areas—the affirmative action area, for example, it has ended up being a quota system. That is not the intent of the legislative body but that is what has been occurring. As I would read your transcript here, there is the potential of that, correcting the old abuses.

I think to set forth a policy of a colorblind Constitution that is prospective is excellent but to start talking about using affirmative action programs to redress old grievances—if by that one means quotas possibly, or even more subtly, goals which turn out to be quotas—I think we create a new class of discriminated-against people. Over a period of time, then they will come in and they will want preferential treatment for a decade or two or three.

I find that an unworkable constitutional and policy posture. If we are going to do that, I think the Congress ought to decide that is what it wants to do, not the executive branch or the bureaucracy or the courts. It is a major policy decision. It ought to be made through the deliberative process of the U.S. Congress.

Finally, I would say the same thing—and I shall be done—the same thing as regards the testimony on the Voting Rights Act of 1965. Its laudable end was to help registration. Now it has ended up being used to totally control the most minute change in the electoral process at the State and local level in a number of States in the South and in parts of other States throughout the country.

It no longer is simply pertinent to registration. It has to do with guaranteeing proportional representation in officeholding. If we want to move that way as a policy question, to get back to my point, then let the Senate and the Congress decide that we shall require in Mobile or Charlotte or wherever that there shall be proportional representation. If we have to amend the Constitution, we can do that, if that is what we decide as a policy matter we want to do.

However, it is now being done today through judicial edict and fiat or through bureaucratic interpretation, and again we do not have any control over it. We have nothing to do with these major policy alterations and changes. Therefore, I come back to the fundamental point: How can we, the Congress, begin to reassert our legitimate and fundamental policymaking role? How can we do that when at the very outset key figures going into this new administration are contending we do not have the powers really to deal with it anyway, and those powers are expressly provided for in the Constitution?

I see a very fundamental philosophical difference here. That is the reason I am here today, just to clarify it, to get it on record. I hope it will be beneficial to my colleagues, if not on this particular point, perhaps in the long run. I hope they eventually begin to see the need to reassert the major obligation we have to make policy in this country, and not forfeit it to the other two branches, which we have been doing with reckless abandon in recent decades.

Mr. Chairman, I shall cease.

Senator **Denton**. Thank you very much, Senator East.

I would like to welcome my friend and colleague, the Senator from Iowa, Senator Grassley, and invite him to make any statement or ask any questions he chooses at this point.

"A.T. & T." CASE

Senator **Grassley**. No, Mr. Chairman, I do not have any questions at this point. Thank you very much, anyway.

Senator **Denton**. In *EEOC* v. *A.T. & T.* the third circuit approved a consent decree ordering quotas as a relief for past discrimination. The Supreme Court has not yet ruled on the constitutionality of this decision. Would you be willing to have the Justice Department argue for a reversal of the *A.T. & T.* case?

Mr. **Reynolds**. Senator, I am not familiar with that case and it probably would be inappropriate for me, if I were familiar, to speak to positions in pending litigation while it is still in court.

I can say, and I guess I would like to say in response to Senator East's statement of a few minutes ago, that I am a bit surprised that he read into my testimony that I condoned or encouraged or approved in any way, shape, or form the use of quotas as a means of affirmative action relief. I think I have said in as many ways as I know how to say that I do not approve of that, and I believe I had underscored that point when we met, Senator, last week.

I am in full agreement with your reservations about the manner in which affirmative action has been used in recent years or misused in recent years to go well beyond what was the traditional intent of Congress under Title VII. I guess I would be more than happy to respond to the specific testimony that you were referring to if I have been unclear but I certainly have not meant to indicate that I would condone the use of quotas in any regard. Certainly, Senator, that is my philosophy and would be my philosophy with respect to my enforcement of the civil rights laws if I were confirmed.

Senator **Denton**. Go ahead. Since the witness was responding to Senator East, if you want to respond, Senator, please do.

AFFIRMATIVE ACTION

Senator **East**. Your point is well taken, Mr. Reynolds. However, again the troublesome thing is in the testimony. I would submit that in a fair initial reading one would have another possible impression.

If I might read here:

> Senator **Specter**. What is your view of the Civil Rights Division, of what the policy should be with respect to affirmative action?
>
> Mr. **Reynolds**. The term "affirmative action" is one that is probably too loosely used in many instances. My feeling is that where there has been a finding of

> discrimination based upon race, color, religion, sex, or national origin, that affirmative action should be a part of the remedy in order to ensure that those people who have been injured by that discriminatory conduct are put back into the position that they would have been had it not been for that discrimination. In addition to that, I think that those people who potentially were the subjects of that discriminatory conduct should also be put back into the position that would have been there had there not been discrimination.
>
> Senator SPECTER. Therefore, you would view the powers of the Civil Rights Division to implement a policy of affirmative action where discrimination had placed one particular group or another in a less favored position than they would have been otherwise.
>
> Mr. REYNOLDS. That is correct, where there has been a determination of discrimination and a showing of injury or potential injury as a result thereof.

Senator EAST. Then Senator Specter goes on into other matters.

Now I would argue—and I am not, again, trying to put words in your mouth or to make a caricature of your position—but that a fair initial reading of that would not necessarily by any means rule out quotas. They might by a fair reading even be implied because you talk about past discrimination, you talk about potential discrimination, you talk about putting people back into the position they would have been before that. It begins to take on a flavor of some kind of preferential quota treatment.

What you are saying for the record here—which I appreciate and I think we ought to acknowledge—is that that is not what you meant here, it is not what you intended. You think affirmative action ought not to be a code word for quotas. If that is where we are on it, I think that is a sound position.

Mr. REYNOLDS. I believe that is the same testimony that Senator Denton raised with me initially and I tried to explain it in that manner. I do not believe that affirmative action should be code words for quotas, nor do I believe that goals and timetables should be code words for quotas.

Senator DENTON. If the equal protection clause requires that violations to it be intentional, do you believe that legislation enacted under the authority of that clause can establish any more lenient standard? Would that be the same with the 15th amendment, since the Supreme Court in the *Mobile* case also seems to require an intentional violation for that section? They ruled in favor of the form of government there in my home town.

Mr. REYNOLDS. Yes, sir.

Senator DENTON. This is a Senator Hatch question, by the way, not mine.

Mr. REYNOLDS. I think Congress has enacted legislation which has been upheld by the courts, which has incorporated a standard that goes beyond the purpose standard that is applicable to the Constitution. There is certainly authority to suggest that Congress can do that if it has valid and justifiable reasons to do it.

I think that one must look very carefully at what the rationale and the reasoning are that Congress rests its decision on in order to promulgate legislation that does go beyond the purpose and intent that is imbedded in the Constitution. I think that would be true whether you are talking about the 14th or the 15th amendment or any of the others.

Senator DENTON. Given that lower courts are in disagreement about whether or not the effects test is permissible in the context of title VIII would you favor congressional amendments to clarify the requisite standard of proof? If so, what type of amendments would you favor?

This is another question from Senator Hatch.

Mr. REYNOLDS. I certainly think it would be useful for Congress to address the question and to speak to it directly. There does seem to be some confusion based on the fact that Congress has not yet spoken as to whether or not an effects standard under title 8 does apply. I believe the majority of the courts of appeals have indicated that they read the congressional intent under the Fair Housing Act as applying an effects test but the Supreme Court has never spoken to it.

Therefore, I would think that that would be an area where it would make eminently good sense for Congress to address that question and speak to it directly in the form of legislation. I guess I could not at this juncture really give an opinion as to where I would come out on the specifics of that legislation, without seeing it, but I think that it would certainly be warranted and it should be something that Congress considers. I will say——

Senator DENTON. You define—excuse me.

Mr. REYNOLDS. If I can, I will add that I think that there has been a lot of mischief that has been wrought by an application of the effects test under the Fair Housing Act. I think there are cases that certainly disturb me greatly, that have gone off on the use of an effects rather than a purpose test in order to try to establish some violation under that statute.

WHAT CONSTITUTES EXCESSIVE POLICE FORCE?

Senator DENTON. You defined prosecution of instances of alleged excessive police force, as you described it, as a priority of yours. What would be your system for determining what constitutes excessive police force? Is that too subjective a question?

Mr. REYNOLDS. I am tempted to say I cannot describe it but I know it when I see it. However, I will not quite go that far.

There are a number of instances, I believe, that are a matter of litigation at this time where police have, in the course of an arrest, brutally beaten the individual who is arrested without provocation, to the point where there is considerable bodily injury. There are also cases where that kind of treatment has resulted in deaths. Those, to me, are cases that I think clearly should be prosecuted where the evidence suggests that there was no provocation for the police officer to undertake that kind of treatment.

I do think that in each of those cases there has to be a very careful investigation before a prosecution is brought, so that the situation does not arise where some police officers are indicted for a brutal kind of treatment which really turns out to be something that was provoked by the victim, and is a matter of self-defense in effectuating the arrest. There are areas, gray areas, I believe, where we ought to be extremely careful not to move forward without the proper amount of evidence.

CIVIL RIGHTS OF POLICEMEN

Senator DENTON. On the other side of the coin, I imagine a lot of our citizenry are concerned about the protection of civil rights of policemen. This has nothing to do necessarily with the racial situation.

When a police officer swears to protect life and liberty of citizens, he assumes risk no one else assumes, and many of the serials on television show that the guys are often placed in a relatively unfair position in terms of whom is protected against what. What protections are you prepared to assert for police officers' civil rights, if any?

Mr. REYNOLDS. I am not sure I am tracking your question, Senator. Obviously, the civil rights of police officers are entitled to the same enforcement as the civil rights of every other citizen.

Senator DENTON. Well, I guess getting down to the nitty-gritty——

Mr. REYNOLDS. I am not sure your question falls within my responsibility within the Justice Department.

Senator DENTON. I guess I would be interested in just your general personal perception of whether or not police officers throughout the country, with the kind of violence that we have relatively rampant and the undermanned police forces, and the limitations placed on the use of weapons or even the drawing of them in some cases, if they do not deserve a look with respect to being in an unfair position right now.

Mr. REYNOLDS. I think that is right. That was part of the reason that I suggested in my previous answer that one has to be very careful about the decision to prosecute police officers in a situation where there is a claim of undue force and undue brutality. I do think that there are any number of mitigating circumstances that probably evolve from the very kind of situation you are talking about that would have justified the action that was taken.

As to what affirmative steps might be taken to enhance the ability of the police force to carry out its responsibilities in a way that safeguards policemen better against the kind of dangers that you were talking about, my suggestion was that I am not sure that would be within the realm of my responsibility as the Assistant Attorney General for the Civil Rights Division.

Senator DENTON. I want to register a complaint. Although I am interested in this field of protecting the citizens' rights, the officers' rights and so forth, and in the importance of the crime problem in our Nation today, I really believe—and I think this is not perceived to the degree that it should be in Congress—that we are missing the principal cause for the predilections toward violence on the part of our citizens, the lack of citizenship in general with respect to perhaps 20 or 30 years ago.

I believe the real cause is in the depreciation of the overall strength of the institution of the American family. If those little hothouses, those little nurseries of citizenship traits being inculcated, values being passed on to children, are not restored to a stronger position we are going to have increasing problems sociologically, economically, and strategically.

I have had this feeling or this conviction for 8 years, since returning to this country, and I am quite frustrated by what I perceive to be the fact that not enough of our populace and not enough of our lawmakers perceive that as a basic source of many of the other problems which are being approached from the economic or legal sense. I just want to place that in the record.

If a Federal officer is attacked by persons because he is a Federal officer doing his duty, do you believe he is protected under the United States Code and that his assailant should be prosecuted under that statute, 18 U.S.C. 245(b)(1)(c)?

Mr. REYNOLDS. I think that there would be a legitimate area of inquiry under that statute as to whether the facts justified a prosecution.

Senator DENTON. If a State officer is attacked because of his race, as in Miami, do you believe his rights are protected and that his assailant should be prosecuted under 18 U.S.C. 245(b)(2)(c)?

It was racial incident which had very undesirable overtones and could understandably excite sentiment—at least an alleged incident of that type which would understandably provoke it—but then when an innocent State officer gets out there trying to preserve order and he is assailed and beaten to death, should his assailants be prosecuted under the named statute?

Mr. REYNOLDS. I have to say very candidly, Senator, that I really do not know the answer to that question at this juncture. I would suspect that that would be one of the statutes that would be considered. I am not sure whether there are other, more appropriate statutes in the situation that you pose that would be better utilized.

I apologize for not having that answer but I am still in the process of trying to get up to speed in an area that has a number of statutes and a number of different areas of responsibility, and I do not have a precise answer on whether that statute would be the appropriate one in that instance or there might be some other criminal statute or other civil statute that would be better utilized.

Senator DENTON. With Senator East's indulgence, I just have two more followup questions on that.

Do you believe that a good faith State prosecutive action, either grand jury, no bill, or acquittal, or conviction of a lesser offense, should preclude Federal involvement in prosecution of police officers in cases of alleged excessive police force?

Mr. REYNOLDS. As a general matter I would say, yes, I do believe that. I think that the exception would arise only where a legitimate Federal interest which might be involved had not been adequately vindicated by the State prosecution. However, I think that is a rare situation and that as a general matter, my answer to your question would be in the affirmative.

Senator DENTON. In that context, would you care to state a view on the Federal intervention and prosecution of police officers in Miami?

Mr. REYNOLDS. I am not sure, I am not exactly sure what your question is.

Senator DENTON. There were police officers accused of killing a black motorcyclist, and if you are not familiar with the case there is no need to pursue it.

Mr. REYNOLDS. I am familiar only in terms of what I have read about it in the newspapers. If you are asking me to state a view as to what prosecutorial action might be warranted or what further action might be warranted by the Federal Government in that instance, I really am not in a position to——

Senator **Denton**. I consider that a very prudent decision, not to base any calculated judgment on a newspaper account.

Senator **East**. Thank you, Senator Denton.

I would like to make a final comment or so, Mr. Reynolds. I do feel in terms of our discussion on particulars, I have stressed the jurisdictional question, and Senator Denton and I together have talked about affirmative action and also the Voting Rights Act. These were specific things that troubled me in the transcript, and hence I enjoyed the opportunity of talking with you the other day for some clarification and also this morning.

We come back in my judgment to this question of how do you obtain change in the democratic system. In the Justice Department the area you are in is a very critical area in terms of bringing about policy change. You know as well as I do, the way the law is perhaps interpreted in the Justice Department, the kinds of cases that it takes up and proceeds with, the kinds of people they put on those cases, will affect the outcome. We are both sufficiently understanding of the political process to know that.

Granted, we all come at this problem from a little different angle. Somebody may come at it from the standpoint of some particular interest group, and somebody may come at it from the standpoint of the Justice Department, somebody may come at it from the standpoint of the courts. I admit that I am not free of a perspective here in terms of the U.S. Senate.

However, I can say with great conviction that the essence of the democratic process is allowing people, through representative government, to make their major policy decisions. I would happily debate that proposition anywhere in the land, that that is the fundamental point of democratic political theory. That is what the framers had in mind. That is why in article 1, section 8 they gave the Congress enormous powers.

Even in the other articles, for example, article 3, they gave us power to control the other branches in a very real way, whether it is the power of the purse, the power of withdrawing jurisdiction, or whatever it may be. We have reached that point in American political history in the contemporary period, as I have suggested, where there has been enormous erosion—as I see it, and I think many see it—of our policymaking functions, to the great detriment not just to us as an institution but to the deliberative representative process which is the heart of democratic political theory.

In order for us to try to reassert what I consider our very legitimate position, we are going to need the tools the Constitution gave us. When I see others gratuitously giving those up it concerns me, and in my judgment rightly so.

Beyond that, I would be concerned—and I do not wish to put you on the spot—but about who is going to be working in your division over there. Are we going to have the people who were there before, the same people, the same group, the same policies, the same attitudes? Is it going to be business as usual? Are we going to have a lot of the Carter holdovers there who will simply remain entrenched, hunker down, let the political top turn, a new President, new Senators, new Congressmen, new this and that but the bureaucracy will hunker down and nothing will change?

I am concerned about that because I know, I know and you know, that it will be very important who serves not only at the top job but in your job and who are underneath. If the Senate and the Congress think they can get some policy change in this country without being concerned about that, they are darn naive. In 6 months or a year they will be having the same problem that Senators and Congressmen had with President Carter. They have no control. All they can do is begin to disassociate themselves from the administration and say, "Isn't that a terrible thing?"

I have made it clear in every confirmation hearing I have had that I, as one new Senator, I do not intend to go home and apologize for the administration. If they can produce and be effective, I am on their side. If they cannot, I will say, "I am sorry. Yes; they have not lived up to what they promised, and I disassociate myself from them." It is the only way I know of as a Senator to maintain the confidence of the people that sent me here. The overwhelming majority were Democrats, who did not ask me to come up here and be a yellow dog Republican and simply go along with anything that was done in the name of the Republican Party.

As much as I have been a lifelong Republican and all that kind of thing, I know what the people out there want, irrespective of party, is some change. That is why Ronald Reagan is in there. The appointees at the top and down at every level need to reflect that in a fairly substantial degree, or we will get no change. Again, it will be like a great wave passing over and when it goes back out to sea, the same people are right there, the same people that served President Carter, the same people that created all the turmoil and disaster and constitutional crisis, will still be there.

There is a lot of pressure on us not to want to change that, just to leave it the way it is and just have confidence that everything will work out well. That is what was done previously and it did not work. I wanted to make it clear, that is why I am in here probing away at it.

I do not do it because of you as a particular person. Your credentials are impeccable, your moral integrity is beyond question. As I say, I have done it in every confirmation hearing that I have been a part of, and I wanted you to understand the spirit in which I do this. It is not personal. It is not personal, and I may be a bit zealous in pursuing it but I think that is my responsibility to the confirmation process. I intend to honor that with the new nominee to the Supreme Court, with whom I have the pleasure of meeting this afternoon.

I do not see why we should acquiesce and not ask questions. We have a constitutional obligation to do it. We are part of the confirmation hearings, and I want the record to show that the reason I am in here toiling away—or fretting away, some may feel—is because it is important to me what the basic policy, philosophical positions are of those being appointed in these new positions.

If it does not work out well over the near term and the long term, I for one will be back hounding the administration and hounding others, and arguing they are not living up to what I think was the mandate of the 4th of November.

Therefore, I did want you, Mr. Reynolds, in a final comment to understand the context in which I say it. Please do not misread it. It is not in any way to be construed as a personal attack upon a man of your credentials and a man of your obviously impeccable moral character.

Thank you, Mr. Chairman. I have no further questions.

Mr. REYNOLDS. Senator, I just want to say I did understand that and I appreciate it. I would also state that I do believe that there is no fundamental disagreement between us, based upon your statements here today.

Where we have the difference of opinion with regard to that one matter, as I indicated to you, you certainly have researched it much more than I have and it's a preliminary view. I do not think it was a gratuitous comment because I was asked by the chairman and everybody up there what my view was, and I had to give that. I am under oath to do it.

However, that particular area is really one outside of my responsibility and would not be one that I would be involved with at the Department of Justice. Certainly if I were, especially after listening to your comments and views on it, I would want to research it much more thoroughly than I have before I came down with a final, definitive answer in the area.

I think that apart from that one area, that there is fundamental agreement between us on what you have said today across the board. I just wanted to state that.

Senator EAST. Thank you, Mr. Reynolds, Mr. Chairman.

Senator DENTON. Thank you, Senator East.

I want to respectfully welcome the chairman of another committee on which I serve, the distinguished Senator from Utah, Senator Orrin Hatch, and ask him to reciprocate from a situation of yesterday in which I took over the chairmanship of a hearing from him.

If you will, Senator, I have only one more question to ask and then I would ask you to take over with your important statements and questions.

We still have a criminal section remaining in the Civil Rights Division. I wonder if it is time to consider it appropriate to place those responsibilities in the Criminal Division of the Department? It would seem that bombings, assaults, and arsons are ordinary criminal offenses which could be handled by competent criminal prosecutors under that division. Do you have any feeling on that, sir?

Mr. REYNOLDS. Senator, I guess I do not have a strong feeling one way or the other on it. I think that that would be an appropriate area of consideration that could be given to the question. I think that could be appropriately considered.

I do feel that the criminal section of the Civil Rights Division serves a useful purpose and I think that those resources are well applied. There is obviously a lot of history as to why that section is there as opposed to being in the Criminal Division, and I am not fully apprised of the background of that decision. However, I will concede that it suggests itself or lends itself to some consideration and review of that background in order to ascertain whether it would make sense to make that kind of a switch.

Senator **Denton**. Well, I want to thank you personally, Mr. Reynolds, for your candor and sincerity and completeness in answering the questions. You have been hearing from a constitutional law expert and from a man who knows little about that. Now you are going to be questioned by a distinguished lawyer, Senator Orrin Hatch, to whom I turn over the chairmanship of this meeting, with your permission, sir.

Senator **Hatch** [acting chairman]. Thank you, Senator Denton. It is nice to have you here, Mr. Reynolds. I am sorry that I could only get here for this latter part of your confirmation hearings.

I would ask unanimous consent that my full statement be placed in the record at the appropriate place at the beginning of the record, and without objection, so ordered.

Could you tell me in as much detail as you are able what the role is of statistical evidence in the identification of violations of civil rights law? Let me give you a little bit of background. Last fall we had a horrendous battle here in the U.S. Senate—a battle between people who believed in the same end, that is, ending racial discrimination in the open housing laws and fair housing laws—but which became deadlocked over one issue.

Actually, there were more than one, but the central issue was: Should we be able to allow people to use just statistical evidence and justify discriminatory complaints based solely on statistical evidence—under what is known as the effects test or the disparate impact test in identifying the existence of discrimination—or should there be some showing of the intent to discriminate, whether by circumstantial evidence or otherwise, including the use of the effects test and/or disparate impact test?

Believe it or not, that deadlocked the battle and it had to be fought right to the end. Of course, that so-called fair housing law was not enacted. I look upon that as one of the major crucial issues of the next year or so, maybe the next 10 years, and maybe the full lifetime of our country.

A number of us looked at that, that if we can justify charges of discrimination against people who never had any intent to discriminate whatever, that we are calling people racists without proving that they had the bad state of mind to commit racism. In addition, a logical extension of that law would have allowed the Justice Department—and frankly, almost anybody else concerned with it—to go into every city, town, or hamlet in America and overturn the zoning laws and the land use planning devices, even though there was never any intent to discriminate by the community. That would turn this country upside down was at least my contention on the floor, and I think the battle showed that my contention was the one that held the day.

My question is this: Could you tell me in as much detail as you are able what the role is of statistical evidence in the identification of violations of the civil rights law? Would you be for a rule that said that statistical evidence standing alone—through use of the effects test or disparate impact test—would be enough to determine discriminatory conduct in our society?

Mr. **Reynolds**. Senator, I believe that the Supreme Court has said that the use of statistical evidence is appropriate in the area that you are talking about.

Senator **Hatch**. No question, the use is appropriate.

Mr. **Reynolds**. As to whether it should be exclusively the basis for a finding of discrimination or whether some intent or purpose should be shown, I think my own personal view is that proof of purpose or intent should be required, some element of purpose or intent, either through statistical evidence or another means or by simply showing wrongful purpose or intent.

Senator **Hatch**. You are saying that is essential?

Mr. **Reynolds**. I think that is by far the preferable way to prove discrimination. Obviously my responsibility is going to be to enforce the laws as the Congress enacts those laws. If Congress were to enact a law that said that the effects test was appropriate under the Fair Housing Act, then it would be my responsibility to take that into account in that area.

Senator **Hatch**. However, your personal preference is to require, before anybody could be branded a racist, some element of intent?

Mr. **Reynolds**. Some element of purpose or intent.

Senator **Hatch**. In other words, if you had your personal preference, the use of statistical evidence would not in and of itself be dispositive on these issues?

Mr. **Reynolds**. I would say as a general matter that is correct.

Senator **Hatch**. As you know, there is a circuit court split on the issue itself and the Supreme Court—although it has indicated some tendency toward requiring some element of intent—has not fully defined or ultimately ruled on this particular issue, at least I do not think it has.

Mr. **Reynolds**. I think that is right. I do believe that the circuit courts have addressed the issue but the Supreme Court, at least in the title VIII area, has not yet ruled.

Senator **Hatch**. Now what precisely are your views on the use of some form of effects test or disparate impact test in identifying the existence of discrimination? If you could, could you please discuss this in the context of both title VIII, the fair housing provisions, and the Voting Rights Act?

Mr. **Reynolds**. Well, as I indicated to you with respect to title VIII, it is not altogether clear at this stage whether the effects test is applicable; at least the Supreme Court has not indicated that it is applicable. There are a number of courts of appeals and other courts around the country that have applied an effects test in the title VIII area. They have done so on the basis that Congress so intended in the existing legislation. With that state of the law, obviously that would have to be taken into account.

With reference to the Voting Rights Act, I think the Congress was very explicit under section 5, the preclearance provision, that the test would be purpose or impact. The Court ruled in the *City of Mobile* case that outside of that area, where you are talking about a constitutional violation, the only standard is the purpose standard. Obviously my responsibility would have to be to enforce the laws as they exist today, or until they are changed.

Senator **Hatch**. We understand that. A lot of minority people, arguing on the other side of the issue, would say that having an intent test is too high a standard or burden of proof because you cannot go into a person's mind and figure out what they meant or what they were intending or what they were trying to do.

Now as an attorney, do you think that is a major obstacle if you were allowed to use circumstantial evidence and go to the jury?

Mr. REYNOLDS. As an attorney, I would say that I think that one could establish purpose or intent if it existed, and could do it especially if you follow the Supreme Court's decisions which make it clear that evidence going to disparate impact or effect bears on the question of intent. Therefore, while the effects standard standing alone might not apply in certain areas, the use of evidence going to disparate treatment or discriminatory effects does bear on the question of intent.

Senator HATCH. Sure. Those of us who have tried——

Mr. REYNOLDS. The Supreme Court has said that, and certainly if the Congress passed a law in the fair housing area which said purpose alone is the standard, as a lawyer I think that I would have to say to you very candidly that I believe one could marshal the evidence to prove intent if there was intent.

Senator HATCH. I have to agree with you. As an individual who has tried literally hundreds of cases, I have had to prove intent almost always through circumstantial evidence.

Mr. REYNOLDS. I think in most other areas of jurisprudence the standard that the laws require is one of intent, and lawyers on a regular basis are able to meet that burden, whether it is the criminal laws or any other case.

Senator HATCH. If the Constitution requires an intent standard, that is, citing for instance the *Washington* v. *Davis* case or the *Mobile* v. *Bowden* case pursuant to the 14th or 15th amendments, how would it be possible for Congress to enact legislation—that is, through the Voting Rights Act—under the authority of these constitutional provisions, and establish a more lenient effects test if the Supreme Court rules or the Constitution requires as a result of a Supreme Court ruling, an intent standard?

Mr. REYNOLDS. Well, Congress has done it and it has been upheld by the courts, I guess most notably under the Voting Rights Act. I think that if Congress can demonstrate that there is a reasonable basis——

Senator HATCH. However, the Court has never come out and said that the intent test is constitutional, that it is a constitutional standard.

Mr. REYNOLDS. Sir, you mean the effects test?

Senator HATCH. No. If the Supreme Court comes out and requires an intent standard as the constitutional standard, then how could Congress then enact some of these laws or implement some of these laws?

Mr. REYNOLDS. I believe that the Supreme Court has said that the constitutional standard under the 14th an 15th amendments in the *Mobile* case is an intent standard.

Senator HATCH. Yes, I think it has.

Mr. REYNOLDS. Congress has passed a law in the Voting Rights Act which has, as one element of that statute, section 5 preclearance that imposes an effects standard. That law has been held constitutional, and it has been held constitutional on the basis that Congress did have a reasoned basis for that formula being inserted into the statute.

Therefore, my answer to you is that I do believe that Congress could in fact do that but I think that it would have to bear the heavy burden of being able to establish a reasoned basis for departing from the intent standard in terms of legislation that falls into the area that you are talking about.

Senator HATCH. Would you favor legislation, as has been proposed, to overturn the *Mobile* case with respect to the permissible standard of proof under the 15th amendment, which is also reflected in section 2 of the Voting Rights Act? What would your views be toward legislation to amend the effects test in section 5 of that same legislation?

Mr. REYNOLDS. Well, right now, as you know, Senator, at the request of the President the Department of Justice is undergoing a full evaluation of the Voting Rights Act and the manner in which that may or may not be changed.

If I am confirmed, I would anticipate being a part of that evaluative process. I have not yet immersed myself in what is a considerable amount of data on the enforcement activity under that act. Until I do so, I am reluctant to begin to voice opinions as to what might or might not be the preferable way for that act to be changed.

Senator HATCH. I am going to submit—excuse me, I did not mean to interrupt you.

Mr. REYNOLDS. I was just saying, at this time I am really not in a position to—I have not formulated an opinion and therefore I am not in a position to give one.

Senator HATCH. I am going to submit further questions to you in writing and I hope you can get them back right away. I am sure you can.

However, one other question that I said I would ask for Mr. Jack Herrity yesterday, the chairman of the Fairfax County Board of Commissioners: He testified before my subcommittee yesterday on the subject of difficulties he was having with the Civil Rights Division in a suit alleging violations of title 7.

At least to my mind, he seemed to make a fairly compelling case that the division was harrassing a community that had made extensive efforts in minority recruitment, and that in fact had done well at hiring substantial numbers of minorities. He further stated that in his opinion, the Civil Rights Division under the present administration had been more abusive and more intrusive than its own predecessors.

Now could you tell me the status of this case, if you know, and what the Division's philosophy is in this kind of suit?

Mr. REYNOLDS. I do not know——

Senator HATCH. If you do not know, will you look——

Mr. REYNOLDS. I do not know the status of the case. Given the fact that it is pending litigation, it would be inappropriate, I believe, for me to voice any kind of opinion in that area.

Senator HATCH. Then I would ask you to look into it because if the facts are as Mr. Herrity has said, then it is an outrage.

Mr. REYNOLDS. I would be more than happy, if I am confirmed, Senator, to look into it and personally to listen to whatever those objections might be, and see if there is a means by which we can address his problems.

Senator **Hatch**. All right, and if the facts are not as Mr. Herrity affirmed, then I would like to know it personally and I would appreciate a personal consultation with me.

Mr. **Reynolds**. All right, Senator.

Senator **Hatch**. Is that fair?

Mr. **Reynolds**. That is fair.

Senator **Hatch**. Now I have a lot of other questions and I think they are all very important questions. Many of them center on the issue of affirmative action as well as on the disparate impact and effects test, the statistical analysis of proof approach that I think is a major, major issue in our society, and with sincere and dedicated people believing in civil rights on both sides of the issue.

From all I have heard about you, you are a sincere and dedicated believer in civil rights and equal rights, and you will fight hard to enforce the statutes as they exist. I complement you and commend you for that. However, these issues transcend even the issue of civil rights. They can be pervasive in our whole society, if we allow a lesser standard of proof in these types of cases than really is constitutionally warranted or mandated.

With that, I will submit the rest of our questions to you and hopefully you will get those answers right back to us so we can get you confirmed.

Mr. **Reynolds**. Yes, sir.

Senator **Hatch**. Thank you so much.

With that, we will recess these hearings until further notice.

[Whereupon, at 12:09 p.m, the committee recessed, to reconvene at the call of the Chair.

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